TRANSCRIPT OF RECORD.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

No. 1418.

JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT, AND CONRAD N. JORDAN,
Plaintiffs in Error,

vs.

CHARLES H. MITCHELL,
Defendant in Error.

QUESTIONS CERTIFIED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

FILED OCTOBER , 1891.

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF ILLINOIS.

NORTHERN DIVISION.

CHARLES H. MITCHELL, *Defendant in Error,* VS. JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT AND CONRAD N. JORDAN, *Plaintiffs in Error.*	*Ejectment.*

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1 PLEAS in the Circuit court of the United States of America for the Northern district of Illinois in the Northern division thereof, held at the United States Court rooms, in the City of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, Judge of the Circuit court of the United States for the Northern district of Illinois, on Wednesday, the twelfth day of August, in the July term of said court in the year of our Lord one thousand eight hundred and ninety one, and of our independence the one hundred and sixteenth year.

WM. H. BRADLEY,
Clerk.

Charles H. Mitchell
vs.
Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan. } *Ejectment.*

NORTHERN DISTRICT OF ILLINOIS, ss.

Be it remembered that on the twelfth day of June, in the adjourned May term of said court, 1891, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, Circuit Judge, is the following entry, to wit:

JUDGMENT.

2 Charles H. Mitchell
vs.
Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan. } *Ejectment.*

And now comes the plaintiff, by his attorneys, and moves the court for judgment in said cause, in conformity with the opinion of the Supreme court of the United States, rendered at the October, A. D. 1890, term thereof.

And the said opinion, together with the mandate of the said Supreme court having been duly filed and inspected by this court, and the court being now fully advised in the premises, doth, in conformity with the said mandate and opinion of the Supreme court, order and adjudge, that the plaintiff have and recover of and from the defendants, the possession of the lands, tenements and appurtenances described and claimed by the plaintiff in and by his amended declaration herein, situate, lying and being in the county of Cook and State of Illinois, to wit:

3 The southwest fractional quarter of fractional section twenty (20) in township thirty-seven (37), north of range fifteen, east of the third principal meridian, according to the official plat of the government survey thereof made in the years A. D. 1834 and 1835, including as part thereof the following described tract or parcel of land, to wit: Beginning at the northeast corner of the southwest fractional quarter of fractional section twenty (20) in township thirty-seven (37), north range fifteen (15), east of the third P. M. and running thence south along the east line of said southwest fractional quarter of the said fractional section twenty (20) and the east extension thereof to the south, to the waters of Wolf Lake; thence along in a southwesterly direction with the waters of said Wolf Lake to a point forty chains due south of the north line of said southwest fractional quarter of fractional section twenty (20); thence due west along the south line of said southwest fractional quarter of said fractional section twenty (20) to a point where said line would intersect with the open or permanent waters of what is at the present time commonly called Hyde Lake; thence in a northerly direction along with the open or permanent waters of said Hyde Lake to a point where the north line of said southwest fractional quarter of said fractional section twenty (20) extended to the west, intersects with the waters of Hyde Lake; thence east along said north line of said

4 southwest fractional quarter of said fractional section twenty (20) to the place of beginning, together with all riparian rights, privileges and benefits incident to the position and location of said land, with reference to the said lakes. And the court doth find, and it is further ordered and adjudged by the court that the plaintiff has

established title in fee simple to said above described lands in him, the said plaintiff, and doth find and assess the plaintiff's damages at one cent. It is further ordered and adjudged by the court that the plaintiff have a writ of possession for said lands, tenements and appurtenances and that the plaintiff also have and recover from the defendants his said damages of one cent, together with his costs herein, and also his costs in said Supreme court, amounting to dollars and cents, and that he have execution therefor.

Afterward, to-wit: On the twenty-second day of June, in the adjourned May term of said court, 1891, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, Circuit Judge, is the following entry, to-wit:

Charles H. Mitchell
vs.
Jabez G Smale *et al.* } *Ejectment.*

41½ Now come the parties by their attorneys and now comes on to be heard the motion of the defendants to set aside and vacate the judgment entered therein on the twelfth instant, and to grant a new trial, and after a new trial, and after hearing a part of the arguments of the counsel, it is ordered that the further hearing of said motion be postponed until to-morrow morning.

Afterward, to-wit: On the twenty-third day of June, in the adjourned May term of said court, 1891, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, Circuit Judge, is the following entry, to-wit:

ORDER.

Charles H. Mitchell
vs.
Jabez G. Smale *et al.* } *Ejectment.*

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendants to set aside and vacate the judgment entered herein on the twelfth instant, and grant a new trial, and after hearing the arguments of the counsel the court takes said motion under advisement.

Afterward, to-wit: On the 12th day of August in the July term of said court, 1891, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, Circuit Judge, is the following entry to-wit:

ORDER.

Charles H. Mitchell
vs.
Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan. } *Ejectment.*

The motion of the defendants to vacate the judgment entered herein on the twelfth day of June, A. D. 1891, and grant a new trial under the statute having heretofore been heard by the Court and taken under advisement, and the Court being now fully advised thereon. It is thereupon considered and ordered by the Court that the said motion be and the same is overruled and denied, to which ruling the defendants now in open court except and are given forty days within which to prepare and present a bill of exceptions.

6 On the hearing of said cause the following exceptions were taken, and were allowed by the Court

and made of record, which said exceptions are in the words and figures following, to-wit:

BILL OF EXCEPTIONS.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Charles H. Mitchell
vs.
Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan. } *Ejectment.*

Be it remembered, that on the 13th day of June, 1891, the defendants filed in said cause a motion in writing to vacate the judgment entered therein on the 11th day of June, 1891, and for an order granting a new trial in said cause under the statute of Illinois, which motion was and is in the words and figures following, to-wit:

7 IN THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Charles H. Mitchell
vs.
Jabez G. Smale *et als.* } *Ejectment.*

And comes the defendant by W. C. Goudy and John I. Bennett, solicitors, and moves the Court to vacate the judgment in the above entitled case and grant a new trial —all costs in said cause having been heretofore fully paid by the defendant.

W. C. GOUDY and
JOHN I. BENNETT,
Attorneys for Defendant.

(Endorsed): Filed June 15, 1891.

8 WM. H. BRADLEY, *Clerk.*

That said motion came on for hearing on the 22d day of June, 1891, pursuant to due notice; that on the trial of said motion the defendants, in order to maintain the issue on their part, produced the clerk's receipt and offered to prove that all costs in said cause had been paid by the defendants on the 13th day of June, 1891, which fact was then and there in open court admitted by the plaintiff to be true.

Thereupon, the defendants, further to maintain the issue on their part, introduced in evidence: First, the record of the first judgment rendered in said cause in this court on the 1st day of February, 1886, and second, the record of an order entered upon a motion of the plaintiff, setting aside said judgment, and granting the plaintiff a new trial under the Statute of Illinois, and entered in this cause on the 4th day of February, 1887.

JUDGMENT.

Monday, February 1, 1886. Present, Hon. Walter Q. Gresham, Circuit Judge.

Charles H. Mitchell
vs.
Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan. } *Ejectment.*

Now come the parties by their attorneys and the Court having considered and being now fully advised upon the matters herein upon the merits finds the defendants

9 guilty of unlawfully withholding from the possession of the plaintiff the following described lands, mentioned and described in the plaintiff's declaration, to-wit: The south west fractional quarter of fractional

section twenty (20) in township thirty-seven (37), north, range fifteen (15) in the county of Cook and state of Illinois, as patented by the United States to Horatio B. De Witt under patent dated March 1st, 1850, and containing four acres and fifty-three hundredths of an acre. The court further finds that the plaintiff has established title in fee simple to said lands in the plaintiff, and assesses his damages at one cent, and that the boundary of said described lands does not extend beyond the meander line of the original survey thereof by the United States, as to all the rest and residue of the land and tenements described in the plaintiff's declaration, the court finds the defendants not guilty.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of and from the defendants the possession of the said first-described lands, according to the force, form and effect of his said recovery, and that he have a writ of possession therefor; and that the plaintiff also have and recover of said defendants the said sum of one cent, his damages, together with his costs in this behalf expended, amounting to dollars and cents, and that he have execution therefor.

10 ORDER.

Friday, February 4, 1887. Present, Hon. Walter Q. Gresham, Circuit Judge.

Charles H. Mitchell
vs.
Jabez G. Smale *et al.* } *In Ejectment.*

The said plaintiff by his counsel having heretofore, to-wit: On the Twenty-sixth day of January, A. D. 1887, and within one year after the rendition of judgment

herein, made application by motion to the court for a new trial herein, under the statute in such case made and provided, upon the payment of all costs recovered against him, which costs were paid prior to the time of making said application or motion; and this cause having been thereupon re-docketed, and said motion having been postponed or continued until this day, and coming on now to be heard, and having been argued by counsel for both parties now here, it is thereupon considered and ordered by the court, in pursuance of the statute in such case made and provided, that the judgment which was heretofore, to wit: on the first day of February, A. D. 1886, rendered herein, be and the same is vacated, and that a new trial be accordingly granted and awarded to the plaintiff herein, his heirs and assigns, in pursuance of such statute. To which action of the court sustain-

11 ing the motion to vacate such judgment, and also in vacating said judgment, the defendant now here objects and excepts, and asks leave of the court to prepare and file a bill of exceptions herein on or before the first day of March next, which is granted.

Thereupon the plaintiff, in order to maintain the issues on his part, introduced in evidence: First. A mandate from the Supreme court of the United States, issued upon the reversal in said court of said judgment entered in this court February 1, 1886, which mandate was and is in the words and figures following, to wit:

UNITED STATES OF AMERICA, ss.

12 *The President of the United States of America to the Honorable, the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:*

[SEAL.]

WHEREAS, lately in the Circuit court of the United States for the Northern district of Illinois, before you, or some of you, in a cause between Charles H. Mitchell, plaintiff, and Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan, defendants, wherein the judgment of the said Circuit court, entered in said cause on the first day of February, A. D. 1886, is in the following words, viz.:

"Now comes the parties by their attorneys, and the court having considered and being now fully advised upon the matters herein, upon the merits finds the defendants guilty of unlawfully withholding from the possession of the plaintiff the following described lands, mentioned and described in the plaintiff's declaration, to wit: The southwest fractional quarter of fractional section twenty (20), in township thirty-seven (37) north, range fifteen (15), in the County of Cook and State of Illinois, as patented by the United States to Horatio B. DeWitt, under patent dated March 1, 1850, and containing four acres and fifty-three hundredths of an acre.

The court further finds that the plaintiff has established title in fee simple to said lands in the plaintiff, and assesses his damages at one cent, and that the boundary of said described lands does not extend beyond the meander line of the original survey thereof by the United States. As to all the rest and residue of the lands and

tenements described in the plaintiff's declaration the court finds the defendants not guilty.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of and from the defendants the possession of the first-described lands according to the force, form and effect of his said
13 recovery, and that we have a writ of possession therefor, and that the plaintiff also have and recover of said defendants the said sum of one cent, his damages, together with his costs in this behalf expended, amounting to dollars and cents, and that he have execution therefor."

As by the inspection of the transcript of the record of the said Circuit court, which was brought into the Supreme court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand eight hundred and ninety, the said cause came on to be heard before the said Supreme court, on the said transcript of record, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said Circuit court in this cause, be, and the same is, hereby reversed with costs; and that the said plaintiff, Charles H. Mitchell, recover against the said defendants two hundred and thirty-four dollars and fifty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit court with directions to enter judgment for the plaintiff in conformity with the opinion of this court.

May 11, 1891.

14 You therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of said Supreme Court, the twenty-ninth day of May in the year of our Lord one thousand eight hundred and ninety-one.

Costs of Plaintiff:

Clerk	$91.00
Printing Record	123.50
Attorney	20.00
	$234.50

JAMES H. MCKENNEY,
Clerk of the
Supreme Court of
the United States.

15 SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

Costs of Charles H. Mitchell.

In No. 167.

1887.	October Term—Docketing cause and filing record, $5.00; appearance, .25; filing precipe, .25; filing papers, .25; continuance, .25	6.00
1888.	October Term—Transfer, $1.00; filing papers, .25; continuance, .25	1.50
1889.	October Term—Transfer, $1.00; filing papers, .25; continuance, .25	1.50
1890.	October Term—Transfer, $1.00; appearance, .25; filing precipes and receipts, $1.00; filing papers, $3.00; filing briefs, $5.00; argument, .20;	

judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $64.50; cost of printing record, $123.50; attorney's docket fee, $20.00; costs and copy, .40..... 225.50

$234.50

Fee Book A. D., page 112.

Test: JAMES H. MCKENNEY,
Clerk, Supreme Court U. S.

(Endorsed): Filed June 8, 1891,
WM. H. BRADLEY, *Clerk*.

16 and a certified copy of the opinion of the said Supreme court in said case, which opinion is as follows:

SUPREME COURT OF THE UNITED STATES.

No. 167.—October Term, 1890.

Charles H. Mitchell, *Plaintiff in Error*, *vs.* Jabez G. Smale, John I. Bennett, Frank I. Bennett, and Conrad N. Jordan. *Defendants in Error.*	In error to the Circuit Court of the United States for the Northern District of Illinois.

(May 11, 1891.)

Mr. Justice BRADLEY delivered the opinion of the court:

The decision of this case depends upon the same general principles which have just been discussed in the case of *Hardin* v. *Jordan*, the two cases being in all essential

respects much alike, both of them relating to land on the margin and under the waters of Wolf Lake. But before adverting to the supposed distinction between them, it is necessary to examine a question of jurisdiction.

The action was ejectment, and was commenced in the Circuit court of Cook county, by Mitchell, the plaintiff in error, against three defendants, Jabez G. Smale and John I. and Frank I. Bennett, and summons was duly served on them. The Bennetts, being attorneys, appeared
17 specially for Conrad N. Jordan, and moved that he be substituted as sole defendant. The motion was made upon an affidavit of Jordan that the Bennetts had no interest, having conveyed the property to him before the suit was commenced, and that Smale was a mere tenant under him, Jordan, and had no other interest. The court denied the motion, and thereupon Jordan, on his own motion, was admitted to defend the cause as landlord and as co-defendant. Afterwards, and in due time, Jordan filed a petition under the act of 1875, for the removal of the cause into the Circuit court of the United States, alleging as a ground of removal that the plaintiff was a citizen of Illinois, and that he, Jordan, was a citizen of New York, and sole owner of the property, and that the sole controversy in the cause was between him, Jordan, and the plaintiff, stating the facts previously affirmed in his affidavit as to the want of interest in the Bennetts, and the tenancy of Smale. Objections to the removal being made by the plaintiff, Jordan asked and obtained leave to amend his petition, and filed an amended petition setting out, in addition to the facts stated in his original petition, the following matter, to wit:

"Your petitioner states that said suit is one arising under the laws of the United States in this, to wit: that

plaintiff seeks in and by said suit to recover lands embraced in a survey of public lands made by the government of the United States in 1874, embracing a part of said section twenty (20), Tp. 37 N., R. 15 E., 3rd P.
18 M., in Illinois, and patents issued under said survey under which your petitioner deraigned title in fee simple before the commencement of said suit, and in him then vested by conveyance from the patentee.

"That the plaintiff claims that he is seized of the fractional tract described in the declaration as the grantee of one Horatio D. DeWitt; that the said survey, patents and deeds of petitioners are not made in pursuance of the acts of Congress and laws of the United States relating to the surveying and disposition of the public lands of the United States, and that said act of Congress and laws have been misconstrued by the said land department and disregarded, and that said survey, patents, deeds and the proceedings of the land department are illegal and void, and in violation of the contract rights of said Mitchell under the laws of the United States; that by virtue of the alleged ownership of said fractional tract described in the declaration, he, the plaintiff, under and in pursuance of said act of Congress and the laws of the United States, is also the owner of said lands so owned by your petitioner by virtue of said survey of 1874 and patents and deeds thereunder. This petitioner claims title in fee to said lands other than said fractional tract by virtue of said survey of 1874, said patents and deeds issued thereunder in pursuance of the act of Congress aforesaid and laws of the United States, and, therefore, states that said suit is one arising under the laws of the United States en-
19 titling this petitioner to a removal of the suit under the act of Congress entitled, 'An act to determine

the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes,' in force March 3, 1875, for that cause alone."

Whether the facts stated in the original petition for removal were sufficient for that purpose, may perhaps admit of some question. The plaintiff was alleged to be a citizen of Illinois, and the defendant, Jordan, a citizen of New York. The citizenship of the other defendants was not mentioned, though it is understood they were residents of Illinois. It is clear, therefore, that the case was not removable, unless the interest of Jordan was so separate and distinct from that of the other defendants that it could be fully determined, as between him and the plaintiff, without the presence of the others as parties in the cause. As he alone, according to his statement, had the title, and as Smale was merely his tenant, if this relation was admitted by Smale (as it was), there would seem to be no good reason why the contest respecting the title might not have been carried on between him and the plaintiff alone, so far as Smale was concerned. This was done in the case of *Ayers* v. *Watson*, (113 U. S. 594); but no objection to the removal on that ground was made, though objections were made on other grounds, which were not sustained by the court. Still, as the fact appeared on the record, if it had been sufficient to divest the Circuit court of jurisdiction altogether, this court could hardly have omitted to pass upon it. We do not see that the statute of Illinois would make any difference in the result. It merely declares that in ejectment the occupant of the land shall be named as defendant, and that all other persons claiming title or interest to or interest in the same may be joined as defendants. (Starr &

Curtiss Stat. 981, Sec. 6.) This is merely declarative of the common law rule, and makes no change in the character of the action or the principles of procedure therein. True, it was decided in the case of *Phelps* v. *Oakes*, (117 U. S. 236), that the tenant is a proper party, and that if the cause is removed by reason of its citizenship, the Circuit court will not be deprived of jurisdiction by the subsequent admission of the landlord as a defendant, though a citizen of the same State with the plaintiff. But this does not prove that a landlord may not become the primary and only contestant, where the tenant's interests are subordinated to and made dependent on his.

As to the other defendants, the Bennetts, there may have been greater difficulties in sustaining a removal. They were made defendants, apparently in good faith, and were not acknowledged to bring his action against
21 them, as well as against Jordan, in order that if he should be successful, there might be no failure of a complete recovery of the land claimed by him. We have held that a defendant cannot make an action several which the plaintiff elects to make joint. (*Little* v. *Giles*, 118 U. S. 596.)

But be this as it may, we think that the additional ground of removal, stated in the amended petition, was sufficient to authorize the removal to be made. It states very clearly that the controversy between the parties involved the authority of the land department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the government of the United States, which was contested by the

other party on the ground of a want of such authority In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the act of 1875. The amendment was properly allowed, and no valid objection exists in regard to the time of the application.

22 The plaintiff's declaration as finally amended contained two counts on which he relied, to-wit:

1. A count claiming the fractional S. W. quarter of fractional Section 20, in Township 37 north, range 15 east, according to the official plat of the survey thereof filed in the land office at Chicago, Illinois, prior to the year 1848.

2. A count claiming so much of the S. W. quarter of said section 20, as lies between Wolf lake and Hyde lake. (This is the land immediately in front of that described in the first count, and, in the original plat, shown to be covered by water.)

The defendants pleaded not guilty, and a jury being waived, the cause was tried by the court before Judge Gresham, in July, 1885, at the same time with the case of *Hardin* v. *Jordan*. The judge made a special finding of facts, and gave judgment for the plaintiff for the S. W. fractional quarter of fractional Section 20, in Township 37 north, range 16 east, as patented by the United States to Horace B. DeWitt, under patent dated March 1, 1850, and described in the first count, but limited by the meander line of the original survey on the side next to the lake; and as to all the rest of the land in dispute, found

the defendants not guilty. The fractional quarter section thus found to belong to the plaintiff was one of the fractional lots on Wolf lake surveyed in 1834–5, as mentioned in the case of *Hardin* v. *Jordan*, lying on the
23 north side of the lake, and on the plat of the survey it was shown as bordering on and bounded by the lake.

The difference between this case and that of *Hardin* v. *Jordan*, is supposed to arise from the fact that a strip or tongue of land running into the lake from the north side beyond the meander line (as mentioned in *Hardin* v. *Jordan*) was immediately in front of the fractional quarter section belonging to the plaintiff. In the special finding of facts the court sets out so much of the original survey as describes the meander line running around the north end of the lake and eastwardly as far as the Indiana line, and also a copy of the plat of the survey, an outline of which is shown in the report of *Hardin* v. *Jordan*. As stated in that case, the meander line is described in the survey as running along the margin of the lake, and the plat shows all the fractional lots to be adjoining the lake. The finding then states that in March, 1850, Horatio B. DeWitt purchased from the United States and received a patent for the lot described as "the S. W. fractional quarter of fractional section 20, in township 37, range 15, in the district of lands subject to sale at Chicago, Illinois, contain $4\frac{68}{100}$ acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor-general," and that the plaintiff by mesne conveyances had acquired and held the title in fee simple conveyed to DeWitt by said patent. The
24 finding then describes the lake and the tongue of land projecting into it from the north side substantially as shown in the report of *Hardin* v. *Jordan*, to which

reference may be made. The finding then proceeds as follows:

"Eighth. That the lakes and lands not embraced in the original survey—that is to say, all the lands, swamp as well as those covered by water, including the ridge, which are outside the meander line, run around said lake or lakes—the Commissioner of the General Land Office caused to be surveyed in 1874; that after such survey was made, the United States, by its proper officers, sold to Alice A. Condit the west half of the south-west quarter, the south half of the east half of the south-west quarter, and lot 2 of the south-west quarter, of fractional section 20, T. 37 N., R. 15 E., of this P. M., and issued to said Alice A. Condit patents in the usual form for said lands, and that the defendant, Conrad N. Jordan, is the owner by mesne conveyances, of the lands so patented to said Condit; that Horatio B. DeWitt, owner of the fractional S. W. of ¼ fractional section 20 in the original survey, contested before the proper officers of the land department the right of the United States to sell and convey title to said lands under said second survey, which contest was decided against the said DeWitt by the Secretary of the Interior on appeal, and in favor of the right of the United States to sell said lands under said survey.

25 "Ninth. That said meander line, as it was originally run across said ridge from a point one chain east of the meander corner on the west, and as is now adopted by the court as a line of boundary, is entirely above the water, except where said line intersects the east line of the fractional quarter section, to which point the water of Wolf Lake may possibly reach at high stages, and that in ordinary stages the waters approach to within four or five chains of said point."

Our general views with regard to the effects of patents

granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin* v. *Jordan*, and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the bed of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of
26 ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which, by its exclusions and inclusions of such irregularities of contour, produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on

the same. The patents, when issued, refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

27 We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective states of all swamp or overflowed lands therein, this cannot be done.

In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed, by the surveyor who made the survey in 1834–5. It is apparent from the finding of facts that the lake in question is subject to considerable changes in the height and depth of the water therein. A datum, or beach mark, is used in Cook County, Illinois, (where the premises in question are situated), as a standard of com-

parison for the height of water in Lake Michigan. Of course the height of water in Wolf Lake is affected
28 by that of Lake Michigan, since they are connected by two different outlets. The finding of facts states that the level water in the lake in question, when the government survey was made in 1834–5, was 2.2 feet above the datum and four-tenths of a foot above the average level of Lake Michigan, which is 1.8 feet above datum. But it also states that Lake Michigan at times rises to five feet above datum, which would cause the lake in question to rise to a level of 2.8 feet (or nearly three feet) higher than it was when the government survey was made. At such times, of course, very little of the said projecting tongue of land would be visible. But whether so or not, it would not alter the case. The existence of such projecting tongue is entirely consistent with the water or lake being the natural boundary of the plaintiff's land, which would include the said projection, if necessary, in order to reach the said boundary. It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary. (*Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Jefferis* v. *East Omaha L. Co.*, 134 U. S. 78; *Middleton* v. *Pritchard*, 3 Scam. 510; *Canal Trustees* v. *Haven*, 5 Gilm. 548, 558; *Houck* v. *Yates*, 82 Ill. 179; *Fuller* v. *Dauphin*, 124 Ill. 542; *Boorman* v. *Sunnuchs*, 42 Wis. 235; *Pere Marquette Boom Co.* v. *Adams*, 44 Mich. 403; *Clute* v. *Fisher*, 65 Mich. 48; *Ridgeway* v. *Ludlow*, 58 Ind. 249; *Kraut* v. *Crawford*, 18 Iowa, 549; *Forsyth*
29 v. *Smale*, 7 Bissell, 201.) The case last cited, *Forsyth* v. *Smale*, presented the very case of a tongue of land projecting beyond the meander line into Lake George, a small lake in Indiana, situated to the east of Wolf Lake and connected therewith. It is cited and

commented on in the opinion in *Hardin* v. *Jordan*. In conclusion, our view on this part of the case is that the patent to DeWitt conveyed, and the plaintiff is entitled to, all of the fractional south-west quarter of Section 20 from its northern boundary line extended southwardly to the actual water line of the lake, wherever that may be, with the riparian rights incident to such position.

The other points raised in the case have been discussed in the opinion in *Hardin* v. *Jordan*, and do not require further notice. In conclusion, our opinion is that the judgment of the Circuit court should be reversed, and that a general judgment should be rendered for the plaintiff for the property described in both additional counts of his declaration. The judgment is reversed accordingly, and the cause is remanded with instructions to enter judgment in conformity with this opinion.

True copy.

Test: JAMES H. MCKENNEY,

[SEAL]. *Clerk, Supreme Court U. S.*

(Endorsed) Filed June 12, 1891.

WM. H. BRADLEY, *Clerk.*

30 And the record of a judgment in this Court, in pur-
ance of said mandate, entered in said cause in this court, June 11, 1891.

It was admitted by counsel that the matter in controversy in this cause exceeds one thousand dollars besides costs.

It is stipulated by counsel as a part of this bill of exceptions, and the facts are accordingly recited as a part hereof to be, that after the first judgment in this case, the plaintiff having within one year moved for a new trial under the statute, and the court, on the fourth day of February, in the year 1887, having allowed the same, the

defendants sued out a writ of error from the Supreme Court of the United States to reverse said order, allowing a new trial, which was made a supersedeas, and no such new trial was had, which writ of error was by said defendants herein after the argument of the writ of error taken by the plaintiff, and before a decision thereon, dismissed at their costs, on the 25th day of March, 1891.

Thereupon, upon argument of counsel, the court took said motion under advisement and afterwards, on the 11th day of August, 1891, entered a judgment and order denying said motion, to which judgment and order of the court the defendants then and there excepted, and prayed for time to prepare, settle and file a bill there of ex-
31 ceptions and for a writ of error to the United States Circuit court of Appeals for the Seventh Circuit of the United States, which prayer was then and there allowed by the court, and forty days given defendants to prepare, settle and file a bill of exceptions herein.

And inasmuch as divers matters and things contained in this bill of exceptions are not matters of record, it is prayed by defendants, that this, their bill of exceptions, may be signed, sealed and settled by the court, which is accordingly done this 5th day of September, A. D. 1891. W. Q. GRESHAM, [SEAL.]

Circuit Judge.

(Endorsed.) Filed Sept. 5, 1891.

WM. H. BRADLEY,
Clerk.

32 Afterward, to-wit: On the eighth day of September, 1891, came the defendants, by their attorneys, and filed in said clerk's office their assignment of errors in said entitled cause, which said assignment of errors are in the words and figures following, to-wit:

ASSIGNMENT OF ERRORS.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Charles. H. Mitchell
vs.
Jabez G. Smale, Conrad N. Jordan, Frank I. Bennett and John I. Bennett. } *Ejectment.*

And now come the said defendants, by W. C. Goudy and John I. Bennett, their solicitors, and say that in the foregoing record and proceedings there is manifest error, and for special errors in said record and proceedings, assign the following:

First. The Circuit court erred in overruling and not granting the said motion to vacate said judgment entered in said court on the 11th day of June, 1891, and refusing to grant a new trial under the statute of Illinois, the costs all having been paid and the motion duly made in open court within one year from the rendition of said
33 judgment, and the said defendants never having had a new trial in this cause under said statute. And

Second. Because of other manifest error apparent upon the face of the record.

Wherefore, these defendants pray that said judgment and order overruling said motion for a new trial under the statute of Illinois may be reversed by the honorable the United States Circuit Court of Appeals of the Seventh Circuit, and these defendants will ever pray, etc.

W. C. GOUDY and
JOHN I. BENNETT,
Attys. for Defendants.

(Endorsed): Filed Sept. 8, 1891.

WM. H. BRADLEY,
Clerk.

Afterward, to-wit: On the tenth day of September, 1891, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following to-wit:

34 KNOW ALL MEN BY THESE PRESENTS, That we, Conrad N. Jordan, John I. Bennett, Frank I. Bennett, Jabez G. Smale and George R. Bennett are held and firmly bound unto Charles H. Mitchell in the full and just sum of one thousand dollars, to be paid to the said Charles H. Mitchell, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this ninth day of September, in the year of our Lord one thousand eight hundred and ninety-one:

WHEREAS, lately, at a term of the United States Circuit court, holden in and for the Northern District of Illinois, in a suit depending in said court, between Charles H. Mitchell, plaintiff, and Conrad N. Jordan, John I. Bennett, Jabez G. Smale and Frank I. Bennett, in ejectment, upon a motion for a new trial under the Statute of Illinois, an order and judgment was rendered against the said Conrad N. Jordan, John I. Bennett, Jabez G. Smale and Frank I. Bennett, defendants in said suit, and the said Conrad N. Jordan, John I. Bennett, Jabez G. Smale and Frank I. Bennett, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles H. Mitchell citing

and admonishing him to appear in the said United States Court of Appeals for the Seventh Circuit, to be holden at Chicago:

35 Now, the condition of the above obligation is such, that if the said Conrad N. Jordan, Jabez G. Smale, John I. Bennett and Frank I. Bennett shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of:

CONRAD N. JORDAN, [SEAL.]
by JOHN I. BENNETT, [SEAL.]
His Atty. in Fact.
JABEZ G. SMALE, [SEAL.]
JOHN I. BENNETT, [SEAL.]
FRANK I. BENNETT, [SEAL.]
GEORGE R. BENNETT. [SEAL.]

Approved by
W. Q. GRESHAM,
U. S. Circuit Judge,
(Endorsed): Filed Sept. 10, 1891.
WM. H. BRADLEY, *Clerk.*

36 NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, William H. Bradley, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings in said court, in the cause wherein Charles H. Mitchell is plaintiff and Jabez G. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan, are defendants, as the same appears from the records and files of said court, now re-

maining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this seventeenth day of September, 1891.

WM. H. BRADLEY,

[SEAL.] *Clerk.*

37 UNITED STATES OF AMERICA, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION. } ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said Circuit court, between Charles H. Mitchell, plaintiff, and Jabez G. Smale, Conrad N. Jordan, Frank I. Bennett and John I. Bennett, defendants, in an action of ejectment, a manifest error hath happened, to the great damage of the said Jabez G. Smale, Conrad N. Jordan, Frank I. Bennett and John I. Bennett, defendants, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Seventh Circuit, together with this writ, so that you have the same at Chicago on the seventh day of October, 1891, in the said United States Circuit Court of Appeals, for the Seventh Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Ap-

peals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 8th day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States, the one hundreth and sixteenth year.

[SEAL.] WM. H. BRADLEY,

Clerk, United States Circuit Court, Nor. Dist. Ill.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals. a true and correct copy of the record and all proceedings in the within entitled case. As witness my hand and official seal, this seventeenth day of September, A. D. 1891.

[SEAL.] WM. H. BRADLEY.
Clerk.

38 UNITED STATES OF AMERICA, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION. } ss.

To Charles H. Mitchell, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago on the seventh day of October, 1891, pursuant to a writ of error filed in the clerk's office of the Circuit court of the United States, for the Northern district of Illinois, wherein Charles H. Mitchell is plaintiff, and Jabez G. Smale, Conrad N. Jordan, Frank I. Bennett and John I. Bennett are defendants, to show cause if any there be why the errors mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, Judge, this 8th day of September, in the year of our Lord one thousand eight hundred and ninety-one.

WALTER Q. GRESHAM.

Received copy Sept. 10th, 1891.

S. S. GREGORY and W. S. PRESCOTT,
For Defendants in Error.

UNITED STATES CIRCUIT COURT OF APPEALS.

SEVENTH CIRCUIT.

THURSDAY, October 8, 1891.

JABEZ G. SMALE, JOHN I. BENNET, FRANK I. BENNETT and CONRAD N. JORDAN,
Plaintiffs in Error,
v.
CHARLES H. MITCHELL,
Defendant in Error.

Be it remember that this cause upon writ of error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division, came on to be heard, and was heard, October 5th, 1891, and the question arose as to the power of the court below to set aside and vacate the judgment entered on the 12th day of June, 1891, pursuant to the opinion and mandate of the Supreme Court of the United States, and grant to the defendants as of course, and simply upon payment of cost, a new trial as provided in the statutes of Illinois relating to the practice in actions of ejectment.

The Court being advised, it is ordered that the above question be certified to the Supreme Court of the United States pursuant to the sixth section of the act entitled, "an act to establish Circuit Courts of Appeals, and to define

and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." Approved March 3d, 1891.

It is further ordered that the transcript for the Supreme Court of the United States shall consist of the record before this Court upon the writ of error, and of this order.

The Circuit Judge did not sit on the hearing of the cause in this Court, and this order is made by the Court, held only by the Circuit Justice and by the Judge of the District Court of the United States for the Northern District of Illinois, who, at the time of the organization of this Court on the 16th of June, 1891, under the above Act of March 3, 1891, and under the joint resolution of the same date providing for the organization of Circuit Courts of Appeals, was assigned to sit as a member of this Court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. } ss.

I, Oliver T. Morton, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify the above and foregoing to be a true, correct and complete copy of the transcript of record as filed in my office, together with the order of said Court entered on the eighth day of October, A. D. 1891.

In witness whereof, I have herewith set my hand and affixed the seal of said Court at my office at Chicago, in said Circuit, this tenth day of October, A. D. 1891.

[SEAL.]

OLIVER T. MORTON,
Clerk.

And now come the plaintiffs in error, by W. C. Goudy and John I. Bennett, their attorneys, and assign the same errors heretofore assigned in the said United States Circuit Court of Appeals, as appears in the within and foregoing Transcript of Record, and pray or therein prayed, that the said order of the said Circuit Court for the said District, denying them a new trial under the statute of Illinois, be reversed and a new trial ordered.

W. C. GOUDY,

JOHN I. BENNETT,

Attorneys for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
OCT 30 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1891.

No. 1418.

JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT AND CONRAD N. JORDAN,
Plaintiffs in Error,
vs.
CHARLES H. MITCHELL,
Defendant in Error.

POINTS, AUTHORITIES AND ARGUMENT FOR PLAINTIFFS IN ERROR.

W. C. GOUDY,
JOHN I. BENNETT,
For Plaintiffs in Error.

CHICAGO, ILL.
BRADBURY BROS., Law Printers, 76-78 Fifth Ave.
1891.

IN THE

Supreme Court of the United States,

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No. 1418.

JABEZ G. SMALE, JOHN I. BENNETT, FRANK I. BENNETT AND CONRAD N. JORDAN,
Plaintiffs in Error,
vs.
CHARLES H. MITCHELL,
Defendant in Error.

POINTS, AUTHORITIES AND ARGUMENT FOR PLAINTIFFS IN ERROR.

An action of ejectment was commenced by Charles H. Mitchell against Jabez S. Smale, John I. Bennett, Frank I. Bennett and Conrad N. Jordan, to recover the south-west fractional quarter of fractional section twenty (20), in township thirty-seven (37) north, range fifteen east in the county of Cook and state of Illinois, in the Circuit court of Cook county, which was removed to the United States Circuit court, and the cause being tried, a judgment was rendered February 1, 1886. By this judgment the plaintiff, Mitchell, recovered the south-west fractional

quarter of fractional section twenty (20) in township thirty-seven (37) north, range fifteen (15) east in the county of Cook and state of Illinois, as patented by Horatio B. De Witt under patent dated March 1, 1850, and containing four acres and fifty-three hundredths of an acre. By said judgment the court further found that the boundary of said land did not extend beyond the meander line of the original survey, and as to the residue of the land described in the plaintiff's declaration, the court found the defendants not guilty. (Rec. [illegible].)

From this judgment the plaintiff, Mitchell, prosecuted a writ of error to the Supreme court of the United States, and it was by that court reversed on the 11th day of May, 1891, and the cause remanded, with directions to enter judgment for the plaintiff in conformity with the opinion of the court. (Rec. [illegible])

It appears from the opinion that the declaration contained two counts.

First, a count claiming the fractional south-west quarter of fractional section twenty (20), in township thirty-seven (37) north, range fifteen (15) east, according to the official plat of the survey thereof filed in the land office at Chicago, Illinois, prior to the year 1848.

Second, a count claiming so much of the south-west quarter of said section twenty (20) as lies between Wolf Lake and Hyde Lake.

It further appears from the opinion that on the trial in the Circuit court a jury was waived and that a special finding of facts was made by the judge, and the Supreme court held that upon such facts so found the Circuit court erred in not rendering judgment for the plaintiff for a greater quantity of land than that described in the judgment.

The court say in the opinion: "Our view of this part of the case is that the patent to DeWitt conveyed, and the plaintiff is entitled to all of the fractional south-west quarter of section twenty (20) from its northern boundary line, extending southwardly to the actual water line of the lake, wherever that may be, with riparian rights incident to such position."

The opinion concludes with the following language:

"In conclusion, our opinion is, that the judgment of the Circuit court should be reversed, and that a general judgment should be rendered for the plaintiff for the property described in both additional counts in his declaration. The judgment is reversed accordingly, and the cause is remanded with instructions to enter judgment in conformity with this opinion." (Rec. 24, 15.)

The mandate was filed in the Circuit court June 8, 1891. (Rec. [illegible])

The opinion was filed in that court June 12, 1891. (Rec. 25)

On the 12th of June, 1891, the Circuit court in obedience to the mandate, entered a judgment in favor of the plaintiff, Mitchell, for all of the south-west fractional quarter of fractional section twenty, in township thirty-seven north, range fifteen (15) east of the third principal meridian, according to the official plat of government survey thereof, made in the years 1834 and 1835, including as part thereof a tract described by metes and bounds, and ordered a writ of possession to be issued. (Rec. 2.)

On the 13th day of June, 1891, the defendants filed a motion in writing to vacate the judgment so rendered on the preceding day, and to be granted a new trial, all costs having been paid by them. (Rec. 4.)

On the 22d day of June, 1891, the motion came on for hearing, when the court heard the argument of counsel, and on the 12th day of August, 1891, the court denied the motion, to which decision the defendants excepted, (Rec. 3.)

The bill of exceptions shows that on the hearing of the motion it was admitted that all costs in said cause had been paid by the defendants on the 13th day of June, 1891, and the defendants, in support of the motion, offered in evidence the record of the first judgment rendered February 1, 1886, and also an order of the Circuit court setting aside said judgment and granting the plaintiff a new trial under the statute of Illinois, on the 4th day of February, 1887. (Rec. 4, 5, 6.)

The plaintiff, to maintain the issues on his part, introduced in evidence the mandate from the Supreme court and the opinion. (Rec. 10, 15.)

The plaintiff also offered in evidence the record of the judgment rendered in pursuance of the mandate June 11, 1891.

It was admitted that the matter in controversy exceeds $1,000 besides costs. (*Ib.*)

The bill of exceptions also shows that counsel stipulated that after the first judgment the plaintiff, Mitchell, having within one year moved for a new trial under the statute, and the court, on the 4th day of February, having allowed the same, the defendants, Smale and others, sued out a writ of error from the Supreme court to reverse said order allowing a new trial, which was made a *supersedeas*, and no such trial was had, and that such writ of error was dismissed on the 25th of March, 1891, after the oral argument on the writ of error sued out by Mitchell, but before a decision therein. (Rec. 16.)

On the 4th of February, 1887, on the application of the plaintiff, Mitchell, the judgment rendered February 1, 1886, was set aside, the costs having been paid, and a new trial ordered in pursuance of the statute of Illinois. (Rec. ~~16~~ 25)

The defendants in the action of ejectment, Jabez S. Smale, Conrad N. Jordan, Frank I. Bennett and John L. Bennett, sued out a writ of error from the Court of Appeals for the Seventh district, on the 8th day of September, 1891, returnable on the 7th day of October, 1891, and assigned the following errors:

First. The Circuit court erred in overruling and not granting the motion to vacate the judgment entered on the 11th day of June, 1891, and refusing to grant a new trial under the statute of Illinois, the costs all having been paid and the motion duly made in open court within one year from the rendition of such judgment and the defendants never having had a new trial under the statute. (Rec. 24 ~~19~~.)

Second. Because of manifest error apparent on the face of the record. (Rec. 27, 28.)

A citation was issued on the 8th day of September, and served on the 10th day of September, 1891.

Section 649, United States Statutes at Large, provides that:—

"Issues of fact in civil cases in any Circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the fact, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 35, chapter 45, of the Illinois Statutes, entitled

"Ejectment," on which the motion to vacate the judgment was made, is as follows:

"§ 35. At any time within one year after a judgment, either upon default or verdict in the action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause. If the costs are paid and the motion therefor is filed in vacation, upon notice thereof being given to the adverse party, or his agent or attorney, or the officer having the writ issued upon such judgment, all further proceedings shall be stayed unt l otherwise ordered by the court. The court upon subsequent application made within one year after the rendering of the second judgment in said cause, if satisfied that justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment, and grant another new trial; but no more than two trials shall be granted to the same party under this section."

The plaintiff claims that because the Supreme court directed a judgment to be entered for the plaintiff, that the right of the defendants to have such judgment entered in pursuance of the mandate, vacated according to the provisions of the statute, has been lost, and that the judgment so rendered is final, and the plaintiff entitled to execution thereon. On the other hand, the defendants claim that the mandate was fully obeyed when the judgment was entered in pursuance thereof, and that the same right exists to a new trial, according to the provisions of the statute, as would have existed had the circuit judge on the 1st of February, 1886, rendered the judgment which the Supreme court say should have been rendered.

POINTS, AUTHORITIES AND ARGUMENT.

I.

THE MANDATE OF THE SUPREME COURT DID NOT PREVENT THE DEFENDANTS IN THE ACTION OF EJECTMENT FROM HAVING A NEW TRIAL, AS A MATTER OF RIGHT.

The concluding paragraph of the mandate reads:

"And it is further ordered that this cause be, and the same is hereby remanded to the Circuit court with directions to enter judgment for the plaintiff in conformity with the opinion of this court."

The opinion of the court was "that the judgment of the Circuit court should be reversed, and that a general judgment should be rendered for the plaintiff for the property described in both additional counts of his declaration."

The contention of the defendant in error is, that such mandate should be read as if there was an addition to the language quoted to the effect that such judgment when so entered should be final, and no new trial should be allowed according to the statute of Illinois. The contention of the plaintiffs in error is that the language of the mandate is not to be changed or enlarge and that it was fully executed when the judgment directed was entered. It is conceded in ordinary cases where a new trial cannot be allowed, except for cause and in the exercise of a discretion by the court, that when a judgment is entered in accordance with the direction of the Supreme court, that there is no right in the court below to award a new trial,

and that execution must issue upon the judgment so entered. But such rule does not apply to an action in ejectment where the party is entitled, without showing cause, to a new trial, and in regard to which the trial court can exercise no discretion.

This rests upon the twenty-fourth section of the judiciary act of 1789, which provides that where a judgment or decree shall be reversed, the Supreme court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the Circuit court to award execution thereupon. This clearly refers to cases where the controversy is ended, the judgment final, and nothing remains but to execute that judgment. The reason for such a provision is that there must some time be an end to litigation, and after the controversy has been decided by the court of last resort, it cannot be that an inferior court should disregard or overrule the judgment of the superior court. *But where the reason fails, the rule fails.* In the case of an action of ejectment there is an absolute right to more than one trial, and on the second trial the former judgment, being vacated, is not evidence of any fact necessary for the determination of the cause, and is not conclusive as to any question of law decided on the first trial.

At common law a judgment in an action of ejectment did not conclude the parties upon any question involved. The suit was brought for the recovery of possession, and the decision, in regard to the title, did not prevent the same parties, or others, from further litigating the question. In most of the states the common law rule was thought to be unwise, and the several legislatures have limited the number of trials which may be had. The effect of a final judgment in ejectment is to settle the dis-

pute in regard to the trial of the property. The legislature of Illinois has provided, by section thirty-four of chapter forty-five, entitled ejectment, "that every judgment in the action of ejectment shall be conclusive as to the title established in such action upon the party against whom the same is rendered, and against the person claiming from, through or under such party, after the commencement of such action, subject to the exceptions hereinafter named."

It was held by the Supreme court of Illinois that the common law rule, that a judgment in ejectment was not conclusive upon the parties, was abrogated by this statute.

Oegten v. *Ross*, 54 Ill., 79.

Immediately following this section is the one which provided that each party should be entitled to one new trial, as a matter of course, without showing cause, upon the payment of costs, and it was further provided in that section, that a court upon a subsequent application, if satisfied that justice would be promoted thereby might vacate the judgment and grant another new trial.

It was clearly the intention of the legislature to change the common law rule and to give a judgment in ejectment the effect of settling the title, but it was thought to be unjust to make the first judgment in such a case conclusive, and for that reason it was provided that each party should be entitled to a new trial, as he would have been at common law. The court might in its discretion grant still another trial in order to promote justice; but until the parties had obtained the number of trials provided by statute, the controversy was not at an end.

Mr. Justice MILLER, in *Mills* v. *Caldwell*, 2 Wall, 41,

in discussing the reasons why a verdict in an action of ejectment was not conclusive by the rules of the common law, says:

"There was perhaps, another reason why the English common law refused to concede to the action of ejectment, which is a personal action, that conclusive effect which it gave to all other actions, namely, the peculiar respect, almost sanctity, which the feudal system attached to the tenure by which real estate was held. So peculiarly sacred was the title to land with our ancestors, that they were not willing that the claim to it should like all other claims, be settled forever by one trial in an ordinary personal action, but permitted the unsuccessful party to have other opportunity of establishing his title."

In that case the judgment rendered on the first trial was held to be conclusive, because the statute of Missouri, where the cause originated, so provided. It was held that the federal courts were bound by the provisions of such statutes.

In *Equator Company* v. *Hall*, 106 U. S., 87, the construction of the statute of Colorado came into question and the court construed it liberally deciding that each party was entitled to a new trial without showing cause. The opinion of the court was delivered by Mr. Justice MILLER in which he says:

"Two questions are presented for our consideration in reviewing the action of the Circuit court in this motion for a new trial. The first is, whether the Circuit court of the United States sitting in Colorado is to be governed by the statute of that state on this subject.

"At the common law the fiction in an action of ejectment by which John Doe and Richard Roe were made

respectively the plaintiff and the defendant, permitted any number of trials after verdict and judgment between the same parties in interest on the same question of title, by the use of other fictitious names, and other allegations of demise, entry, and ouster.

" The evil of this want of conclusiveness in the result of this form of action led to the interposition of a court of equity, in which, after repeated verdicts and judgments in favor of the same party and upon the same title, that court would enjoin the successful party from further disturbance of the one who had recovered these judgments.

" This form of action with its inconclusive results, would be the law in Colorado for the recover of the possession of real estate, but for the statutes of that state, of which section 254 of the Code of Civil Procedure is a part. The framers of these statutes, in abolishing the old common law action of ejectment with its accompanying evils, and in substituting an action between the real parties, plaintiff and defendant, found it necessary to provide a rule on the subject of new trials in actions concerning the titles of land.

" A title to real estate has, under the traditions of the common law, been held, in all the states where that law prevailed, to be too important, we might almost say too sacred, to be concluded forever by the result of one action between the contesting parties. Hence, those states which, by abolishing the fictions of the action at the common law, and substituting a direct suit between the parties actually claiming under conflicting titles, which, according to the nature of this new proceeding, would end in a judgment concluding both parties, have found it necessary to provide for new trials to such an extent as

each state legislature has thought sound policy to require. These provisions for new trials in actions of ejectment are not the same in all the states, but it is believed that almost all of them which have abolished the common law action have made provision for one or more new trials as a matter of right.

We are of opinion that when an action of ejectment is tried in a Circuit court of the United States according to the statutory mode of proceeding, that court is governed by the provisions of the state statute. There is no reason why the Federal court should disregard one of the rules of the possession and title to real estate within its jurisdiction. *Miles* v. *Coldwell*, 2 Wall., 35."

The Supreme court of Illinois has gone to the greatest length in allowing the parties the benefit of all the trials permitted by the statute and given it a most liberal construction.

Chamberlain v. *McCarty*, 63 Ill., 263.
Myers v. *Phillips*, 68 Ill., 269.
Gabian v. *Manley*, 15 Ill., 140.
Reese v. *Chicago*, 40 Ill., 107.
Holbrook v. *Forsythe*, 112 Ill., 306.
Roundtree v. *Talbot*, 89 Ill., 251.
Stolz v. *Drury*, 74 Ill., 107.

The Supreme court of Illinois in *Reese* v. *City of Chicago*, 40 Ill., 107, held that a party might take a new trial under the statute pending the writ of error to the Supreme court from the judgment within the year after judgment, without impairing the jurisdiction of the Supreme court to decide the questions involved, and that the Supreme court would proceed to consider and decide the errors assigned notwithstanding the fact that the judgment had been vacated, according to the provisions

of the statute, in the court below, while the writ of error was pending.

In that case the court say: "It would rarely happen that the party bringing the cause here, could know the result within such time if unfavorable to him, as to enable him to take a new trial under the statute."

If in such a case the result in the Supreme court should be to decide there was no error, and that a judgment of affirmance should be entered, it would not prevent the court below from proceeding to a new trial.

A judgment of the Supreme court affirming the judgment of the court below would not prevent a vacation of that judgment in the trial court as provided in section 35 of the ejectment statute.

In *Holbrook* v. *Forsythe*, 112 Ill., 306, the case was before the Supreme court on a third appeal, and it appeared that on the second of these appeals the judgment of the Circuit court had been affirmed and after such judgment of affirmance that a new trial had been allowed under the statute. Notwithstanding this fact the court proceeded to consider the errors assigned upon the third appeal taken from the third trial in the court below.

When this case was before the Supreme court on the second appeal, it was decided against the appellant and the judgment affirmed. An application was made for a rehearing which was denied. (99 Ill., 319, 325.) Notwithstanding this fact the judgment so affirmed was vacated in the court below on the application of the defeated party as a matter of course without showing cause. (112 Ill., 308.) The opinion of the majority of the court delivered by Mr. Justice Mulkey rests upon evidence produced on the last trial which he says did not appear in

the preceding trial. This point related to the question as to whether there was color of title as a basis for the limitation law. It was held there was not, and so the judgment was reversed.

Mr. Justice Dickey filed a separate opinion in that case in which he says that in his judgment the decision reported in the 99th Ill. was wrong, and he then adds: "I think when a new trial is taken under the statute it sets aside the previous proceedings on the former trial, and entitles each party to a hearing *de novo* on all questions of law as well as of fact which may arise, and that decisions made on or relating to such former trial are not *res judicata.* I think that opinion should be overruled and disregarded, and that the position relied upon in this case as a basis of defense under the statute of 1839, is not sufficient to sustain the defense." (111 Ill., 311.)

The principle announced by Mr. Justice Dickey is unquestionable law. Whenever a new trial is allowed and a *venire de novo* awarded, there is no estoppel by reason of the former judgment or of any fact proved, nor as to any rule of law laid down.

If the contrary were true the allowance of a new trial would be useless. It may be that the principles announced by a court of last resort will be conclusive on the trial court in a new trial, but not becaase there is an estoppel. The reason is, that the rule of law, established by the court having the right to make final decision, must be a rule of law on the same set of facts to govern the inferior court.

When a new trial is allowed, either for cause shown or without cause shown, all of the evidence must be produced on such second trial, the same as if it had not been

ntroduced before. It is not sufficient for either party to prove what the testimony was on the preceding trial except in cases where the witness is dead or beyond the jurisdiction of the court.

As the law does not make a judgment rendered in an action of ejectment final and conclusive, although affirmed by a court of last resort, and does not end the controversy, the reason for the rule which requires the lower court to proceed under a mandate to execution of the judgment affirmed, does not apply. The litigation is not ended. The law affords an opportunity for further controversy. This being the case it cannot be supposed that the Supreme court of the United States in ordering the mandate in the present case intended to do more than require the Circuit court to enter a judgment which it thought should have been entered on the trial in the court below. There is no express direction in this mandate, nor in the opinion of the court showing that it was the purpose to cut off the statutory right of a new trial. There is no express language ordering an execution to issue upon the entry of such judgment. It could not have been the intention of the Supreme court to deprive the defendants in the ejectment suit of the right which existed under the statute of Illinois to a new trial upon the payment of costs, without showing cause. If such had been the intention it would have been expressed in unmistakable language. The position of the defendant in error requires the addition of a specific direction not contained in the mandate or opinion. It was decided that upon the facts found by the circuit judge he should have rendered a judgment in favor of the plaintiff for a larger quantity of land than he did, and for that reason the judgment was

reversed, and an order made to correct the error, that a judgment should be entered for all of the land described in the two additional counts of the declaration. This was done. At that point the defendants, desiring to avail themselves of the right to another trial, paid the costs and moved to vacate the judgment. Objection was made upon the theory that this case was one of a different class, where the decision of the Supreme court is final, and the lower court can only execute the judgment entered. In this the Circuit court erred. That court should have sustained the motion, and awarded the new trial.

In *Butterfield* v. *Walsh*, 25 Iowa, 263, which was an action of ejectment, and the judgment of the District court was reversed by the Supreme court, an application was made for a new trial, based on sections three thousand five hundred and eighty-two, three thousand five hundred and eighty-three and three thousand five hundred and eighty-four of the Revised Statutes of Iowa. The application was based upon the ground that the issues having been determined by the Supreme court and the cause remanded, the lower court could do nothing but render a judgment in accordance with the decision of the Supreme court. The application for a new trial was refused, and an appeal taken from the order to the Supreme court, where the decision of the district court denying the new trial was reversed.

The opinion was delivered by Chief Justice DILLON, and he says:

"When the cause was remanded and judgment entered in the District court for the plaintiff, it was the same as if such judgment had been therein entered and no appeal had been taken. It was simply a judgment

for the plaintiff. In such a case sections 3582 to 3588 of the Revision apply, giving the unsuccessful party the right to apply to the District court for a new trial. (See also Rev., §§ 3112, *et seq.*; also Chap. 141.) In an action of this kind, the statute gives two years from the determination of the former trial in which to apply for the new trial. (Rev., §§ 35–84.)

It is claimed by the plaintiff that the District court was, by the former appeal, divested of all jurisdiction over the case, and hence had no right to entertain the petition or application for a new trial. Our opinion is above indicated. When the cause thus appealed was decided by the Supreme court, and remanded to the District court to enter judgment for the plaintiff, its jurisdiction over the cause was restored. It is true, it must obey the direction of this court, and enter judgment as ordered. When it did so the case was at an end. But the statute gives the right to apply for a new trial. The present application was made accordingly. It was properly made to the District court. After the final decision of the cause in this court, and after judgment had been entered by the District court as directed, the defendants could not apply to this court, if indeed they could at any time, for a new trial.

If they could not in such case apply to the District court, the statute giving the right to make such application would be rendered nugatory. As before remarked, the application for a new trial was founded upon the statute, and particularly upon sections 3,582, *et seq.* The plaintiff claims that these sections only apply to actions at law tried under chapter 144. The correct view is this: The action was commenced at law. The defendant, by the statute, had the right to file an equitable answer. The

plaintiff's action was still one for the recovery of real property, and he recovered accordingly. We see no reason why the failing party may not be entitled to the benefits of the provisions respecting new trials as well where his defense is equitable in its nature as where it is legal.

It is our opinion that the District court erred in holding that it had no jurisdiction of the application for a new trial. Its judgment is accordingly reversed, and the cause remanded, with directions that it proceed to determine the said application. This will result also in the restoration of the so-styled cross-bill of the plaintiff.

Reversed."

The foregoing decision, by the Supreme court of Iowa, is not cited as a conclusive authority applicable to the present case, but merely to show the reasoning adopted by the court, although the statute of Iowa does not give a new trial as a matter of course.

In the court below, counsel for the plaintiff cited as an authority in support of his position, *ex parte* Dubuque and Pacific Railroad, 1 Wall., 69. The entire opinion, delivered by Mr. Justice CATRON, is as follows:

"In granting the new trial, the District court seems to have been governed by two reasons: First, because the statutes of Iowa prescribed that a second trial may be had, of course, in actions brought for the recovery of real estate; and, secondly, because the court below had the power, after the cause was presented there by a mandate from this court and the judgment of reversal entered, to hold that the cause stood on the same footing that it would have done had the District court entered the judgment for the defendant before the cause was brought up to this court. And in that case, it is true, the Dis-

trict court could have granted a new trial at its discretion.

The twenty-fourth section of the judiciary act of 1789 governs the practice in cases brought up and reviewed in this court. It is bound to give such judgment as the court below ought to have given, and the law directs that a mandate shall be sent down to have the judgment entered as final in the lower courts, when it is for the defendant below, as here. The District court had no power to set aside the judgment of the Supreme court, its authority extending only to executing the mandate.

We order that a writ of mandamus to issue to the Circuit court of the District of Iowa, commanding it to vacate and erase the order granting a new trial in the aforesaid cause; and that a judgment be entered in conformity to the mandate of this court.

ORDER ACCORDINGLY."

As that was an action for the recovery of land according to the Iowa code, it would seem at first blush that it is an authority in favor of the defendant in error. But on examination of the case will show that it is not. The case comes within that class where a new trial depends upon the discretion of the court upon cause shown. There was no statute in Iowa which gave a party a right to a new trial. In the argument of Mr. Mason he refers to the statutes of Iowa, and contended that the courts of Iowa were required to grant a new trial, but the statute did not sustain his position. Section 3,112 of the Code, Revision of 1860, page 576, is as follows:

"Sec. 3,112. A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury,

report of a referee, or a decision by the court. The former report, verdict or decision, shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Excessive damages, appearing to have been given under the influence of passion or of prejudice.

5. Error in the assessment of the amount of recovery whether too large or too small, where the action is upon a contract or for the injury or detention of property.

6. That the verdict, report or decision, is not sustained by sufficient evidence, or is contrary to law.

7. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

8. Error of law, occurring at the trial, excepted to by the party making the application."

This section does not expressly refer to an action for the recovery of real property. Section 3,584 of chapter 144, headed, "Actions for the recovery of real property," reads as follows:

"SEC. 3,584 (2,014). The court, in its discretion, may grant a new trial on the application of a party, or those

claiming under him, made at any time within two years after the determination of the former trial."

Revision of 1860, p. 645.

By reference to the statement of the case of *ex parte* Dubuque and Pacific Railroad, it appears that after the mandate went down a judgment was entered in obedience thereto; that affidavits to show new facts were presented and a motion made for a new trial, which was granted by the court, and application was made for a writ of mandamus commanding the court below to vacate the order granting a new trial. It was held by the Supreme court that such motion should be sustained. But it distinctly appears, by this statement, that the right to a new trial was not absolute, but depended, as provided by the statute, upon the discretion of the court, and that discretion was invoked by the presentation of affidavits purporting to show that new evidence could be obtained. This case therefore comes within that class where litigation is ended by a first trial, and does not apply to the class where more than one trial, in cases of ejectment, by statute is allowed.

It was contended by counsel in the court below, that if a new trial was allowed to the defendants, it would be useless, because the Supreme court of the United States had decided the question of title as between the parties in such a manner, that the result could not be varied or changed. If the application was made to the court where it had any discretion, it would be proper to consider that reason. But as the defendants were entitled to this new trial as a matter of course, and without showing cause, and the court had no discretion whatever, this inquiry need not be entered upon. The opinion of the Supreme court was based upon the facts found by the circuit judge.

On another trial those findings would be eliminated. Evidence could be offered by either party without regard to what had been presented at the former trial. It can not be assumed that the evidence would be the same, or the conclusions of the judge the same, even if a jury should be waived. The defendants would be entitled, on another trial, to the opinion of a jury on the facts, and that jury might reach different conclusions from those of the circuit judge on the former trial.

It cannot be presumed that upon a new trial where new evidence would be presented, that the same facts would be established, and therefore that the law as laid down by the Supreme court would be applicable.

If such consideration can be entered into in determining the right to a new trial, the provision of the statute would be abrogated and the party remitted to his rights as in ordinary cases at common law after verdict.

By reference to the decision in *Hardin* v. *Jordan*, as well as that in *Mitchell* v. *Smale*, it will be seen that three of the judges did not concur with the majority opinion. It was held that the Federal court was bound by the decision of the State court on the questions involved. The inquiry, therefore, was as to the rule in the State court. The three judges who dissented held that the highest court in Illinois had decided that in such a case the plaintiffs in the action of ejectment could not recover submerged land. The opinion filed on behalf of the majority of the court treated that decision as *anomalous*, and declined to follow it. On questions of this nature the Supreme court of the United States is subject to the decisions of the state. In other words, the Supreme court of the United States is the inferior court, and the court which must finally settle the rule of law, is the court of

last resort in the state. There is now pending in the Circuit court of Cook county a suit in equity to which all of the owners of property bordering upon Wolf Lake and Hyde Lake are parties, and the question as to the ownership of the submerged land is involved in that suit. Since the judgments rendered in pursuance of the mandate in the Hardin and Mitchell cases that judgment has been plead as a bar to the claims of the plaintiffs in error. It is for this reason that the motion for a new trial has been strenuously resisted, it being the desire on the part of the defendant in error in this case, as well as in the Hardin case, to make use of the judgment as a conclusive bar to any further investigation of the rights of the parties. If the Circuit court of Cook county concurs with the three judges dissenting and follows the case reported in 120 Ill., as may be assumed it will do, it would be an injustice to allow this judgment, which in effect is no more than interlocutory, to stand as a bar to a decision by the court having a final right to settle the controversy. It must be assumed that the Supreme court of Illinois will follow its own decision, and not that of a majority of the Supreme court of the United States. The plaintiffs in error have the right to a decision of the court of last resort and ought not to be concluded by the judgment of any court short of that.

If the judgment entered in pursuance of the mandate should be vacated according to the provisions of the statute, this plea in bar would be removed, and the State court would be at liberty to follow its own judgment on the merits of the controversy. If in that order the state court concurs in opinion with the three dissenting judges, even if the facts are unchanged, there would be no occasion to try this action of ejectment another time; or, if so

tried subsequent to the decision of the State court, that decision would govern the Circuit court of the United States on such re-trial.

It was contended in the court below by counsel for the defendant in error that an application should have been made to the Supreme court, so that the mandate should have expressly provided for the allowance of a new trial according to the provisions of the Illinois statute. If the construction contended for in this argument is correct, the command of the court did not extend beyond the entry of the judgment. The case was left in precisely the same condition as if the judgment had been rendered by the Circuit court on February 1, 1886. The only fair construction that can be given to this mandate is, that the court did not intend to interfere with proceedings, subsequently to the entry of the judgment, which were allowed in actions of this sort.

W. C. Goudy,
John I. Bennett,
For Plaintiffs in Error.

Office Supreme Court U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

JABEZ G. SMALE et al.,
Plaintiffs in Error,

vs.

CHARLES H. MITCHELL,
Defendant in Error.

On certificate from The United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

The action in the Circuit Court was ejectment, judgment went for plaintiff Mitchell, for 4.53 acres, part of the land in controversy, February 1, 1886. He took a writ of error from this court, and also, January 26, 1887, a new trial under the statute, as is permitted by the practice in Illinois.

Rees v. *Chicago*, 40 Ill. 107.

To review the action of the court in allowing this new trial, defendants took a writ of error, which, after the argument of the case of Mitchell on his writ of error,

but before the decision thereof, was dismissed by the plaintiffs therein, March 25, 1891.

This court reversed the judgment on Mitchell's writ of error and remanded the case with directions to the court below to enter judgment for him in conformity with the opinion of the court for all the property sued for, which was done June 12th, 1891, on filing the mandate and opinion in the Circuit Court.

Thereupon the plaintiffs in error paid the costs, and moved to vacate this judgment and for a new trial as matter of right and without showing cause. After argument the Circuit Court denied this motion, and to review this order a writ of error was sued out from the court below. After the argument was heard therein that court certified to this court the question in the case. The certificate is as follows:

"Be it remembered that this cause upon writ of error "to the Circuit Court of the United States for the North- "ern District of Illinois, Northern Division, came on to be "heard, and was heard October 5th, 1891, and the ques- "tion arose as to the power of the court below to set aside "and vacate the judgment entered on the 12th day of "June, 1891, pursuant to the opinion and mandate of the "Supreme Court of the United States, and grant to the "defendants as of course, and simply upon payment of "cost, a new trial as provided in the statutes of Illinois "relating to the practice in actions of ejectment. The "court being advised, it is ordered that the above ques- "tion be certified to the Supreme Court of the United "States pursuant to the sixth section of the act entitled "'an act to establish Circuit Courts of appeals, and to de- "fine and regulate in certain cases the jurisdiction of the

" courts of the United States, and for other purposes,' " approved March 3d, 1891.

" It is further ordered that the transcript for the " Supreme Court of the United States shall consist of the " record before this court upon the writ of error and of " this order."

Following is a recital as to the constitution of the court at the time this case was heard, which it is unnecessary to notice further.

The provisions of the statutes of Illinois relating to this subject are sections 34 and 35 of chapter 45 Revised Statutes. They are as follows:

" 34. Every judgment in the action of ejectment shall " be conclusive, as to the title established in such action, " upon the party against whom the same is rendered, " and against all parties claiming from, through or under " such party, by title accruing after the commencement " of such action, subject to the exceptions hereinafter " named.

" 35. At any time within one year after a judgment, " either upon default or verdict in the action of ejectment, " the party against whom it is rendered, his heirs or as- " signs, upon the payment of all costs recovered therein, " shall be entitled to have the judgment vacated, and a " new trial granted in the cause. If the costs are paid and " the motion therefor is filed in vacation, upon notice " thereof being given to the adverse party or his agent or " attorney, or the officer having any writ issued upon " such judgment, all further proceedings shall be stayed " till otherwise ordered by the court. The court, upon " subsequent application, made within one year after the " rendering of the second judgment in said cause, if satis- " fied that justice will thereby be promoted and the rights

" of the parties more satisfactorily ascertained and estab-
" lished, may vacate the judgment and grant another new
" trial; but not more than two new trials shall be granted
" to the same party under this section."

By this statute the inconclusive character of judgments in ejectment is altered. Under it they have all the stability and conclusiveness which attaches to judgments in other forms of action. At the same time there is attached to them, as a statutory incident referable to the common law practice in its spirit, a right to a new trial, if applied for by the party against whom judgment went within one year therefrom.

Under an earlier statute, similar to this in all essential particulars, it was determined by the Supreme Court of Illinois, what is obvious without authority, that the Circuit Courts could not grant new trials in ejectments as matter of right, except when the party applying brought himself within its terms.

Gibson v. *Manly*, 15 Ill. 140.

In that case the court, speaking by Mr. Justice CATON, said:

" In view of the fact, however, that by our statute
" judgments in ejectment are made conclusive, as between
" the parties to the suit and their privies upon the title to
" the premises, authority was conferred upon the Circuit
" Court to vacate judgments in ejectment, and grant new
" trials upon certain terms, at any time within one year
" after judgments are rendered. The first new trial is
" given to the losing party as a matter of right, upon the
" payment of costs and damages, if applied for within
" that time; and the court may, in its discretion, grant a
" second trial within the year after the second judgment.

" Upon this statute alone does the power of the Circuit " Court depend for granting new trials after the close of " the term at which the judgment is rendered, and when " exercised, it must be done in pursuance of the statute, " and not otherwise.

" The statute has made no provision for excluding from " the computation the time during which the case was pend- " ing in this court for review, and if the statute does not " exclude it, the court has no power to do so. Notwith- " standing an appeal may be taken or writ of error prose- " cuted, the statute still gives the Circuit Court the power " to vacate the judgment within the year. For that purpose " the cause still remains before the Circuit Court."

From this case it plainly appears that pendency of an appeal does not in any way extend the time for applying to vacate a judgment under the statute so as to cause the year to commence to run from affirmance, and that this right is purely statutory, and can only be asserted where the moving party brings himself clearly within the terms of the statute. If he does not, a judgment in ejectment is, in Illinois, as final and conclusive as in any other form of action.

Therefore, the substantial question to be determined upon this writ of error is, whether a judgment entered on mandate reversing a judgment of the Circuit Court, and directing a contrary judgment in conformity with the opinion of this court, is a judgment of that court on " default or verdict " within the meaning of this section, and therefore subject on payment of costs to be vacated on motion of the defeated party within one year, as of right. For defendant in error it is contended that this refers only to a judgment entered on a default, or trial by

the trial court, and not to a judgment on mandate, which is virtually the judgment of this court.

The power of the Supreme Court in reviewing judgments of inferior courts is, in some respects, defined in section 701 of the Revised Statutes:

"The Supreme Court may affirm, modify or reverse "any judgment, decree or order of a Circuit Court, or "District Court acting as a Circuit Court, or of a District "Court in prize causes, lawfully brought before it for "review, or may direct such judgment, decree or order to "be rendered, or such further proceedings to be had by "the inferior court as the justice of the case may require. "The Supreme Court shall not issue execution in a cause "removed before it from such courts, but shall send a "special mandate to the inferior court to award execution "thereupon."

This court does not enter judgments and issue execution as is done in courts of last resort in some of the states, but having decided the case, remands it to the court below, with directions there to enter the appropriate judgment. When judgment has been entered in accordance with such direction of this court, it becomes in substance and effect the judgment, not of the court to which the case was remanded, but of this court, and as such it is not subject to be superseded or controlled in any way by the court below.

Stewart v. *Solomon*, 97 U. S. 361.
Humphrey v. *Baker*, 103 U. S. 736.

This view was taken under the Judiciary Act.
Ex parte Sibbald, 12 Peters, 488.

Section 24 of the Judiciary Act of 1789 is as follows: "And be it further enacted, That when a judgment or de-

" cree shall be reversed in a circuit court, such court shall " proceed to render such judgment or pass such decree as " the district court should have rendered or passed, and " the Supreme Court shall do the same on reversals there- " in, except where the reversal is in favor of the plaintiff " or petitioner in the original suit, and the damages to be " assessed or matter to be decreed are uncertain, in which " case they shall remand the cause for a final decision. " And the Supreme Court shall not issue execution in " causes that are removed before them by writs of error, " but shall send a special mandate to the Circuit Court to " award execution thereupon."

This section might seem to contemplate that this court should render, except in special cases indicated, the appropriate judgment, and, therefore, when this court, instead of entering judgment, sent back a case under that act to the court below for the entry of judgment, it might be argued with much more plausibility than it can be under the section of the revised statutes quoted, that the judgment so entered was the judgment of the court below, and not of this court.

But the contrary has been held, as indicated in the case cited, and in a later case, where it may fairly be said the question now before the court was decided adversely to the contention of the plaintiffs in error.

Ex parte Dubuque & Pacific R. R. Co., 1 Wall. 69:

This was an application for a mandamus to the Circuit Court of the district of Iowa. There a judgment had been entered for the plaintiffs in a proceeding under the code of Iowa, which was substantially an action of ejectment. The judgment was reversed by this court, and the court below was directed to enter a judgment for the

defendant. Having done this the court below, upon affidavits being filed showing plaintiff's ability to prove new facts, granted a new trial. This court awarded a writ of mandamus directing the court to vacate and erase the order granting a new trial.

The statutory provisions relied on by the party seeking the new trial were as follows:

Section 3112 (code of Iowa, revision of 1860):

"A new trial is a re-examination in the same court of "an issue of fact, after a verdict by a jury, report of a "referee, or a decision by the court. The former report, "verdict or decision shall be vacated, and a new trial "granted, on the application of the party aggrieved, for "any of the following causes affecting materially the sub-"stantial rights of such party:

"1. Irregularity in the proceedings of the court, jury, "referee or prevailing party, or any order of court or "referee or abuse of discretion, by which the party was "prevented from having a fair trial.

"2. Misconduct of the jury or prevailing party.

"3. Accident or surprise, which ordinary prudence "could not have guarded against.

"4. Excessive damages, appearing to have been given "under the influence of passion or prejudice.

"5. Error in the assessment of the amount of recov-"ery, whether too large or too small, where the action is "upon a contract or for the injury or detention of prop-"erty.

"6. That the verdict, report or decision, is not sus-"tained by sufficient evidence or is contrary to law.

"7. Newly discovered evidence, material for the "party applying, which he could not, with reasonable "diligence have discovered and produced at the trial.

" 8. Error of law occuring at the trial excepted to by " the party making the application."

Sec. 3584 (found in chapter 144 relating to actions for the recovery of real property). " The court in its dis- " cretion may grant a new trial on the application of a " party, or those claiming under him, made at any time " within two years after the determination of the former " trial."

It is true that this statute provided that a new trial might be granted without any cause shown, in the discretion of the court, on application within two years after the determination of the former trial, while the statute of Illinois permits a new trial to either party against whom judgment in ejectment has gone within one year, as matter of right; but this court held that the judgment entered in pursuance of its mandate was not a judgment of the district court in which this case had been originally heard, and was not subject to this incident which would have attached had the judgment been that of the district court. The case was treated as one where the statutes of Iowa permitted a new trial as of course, because the discretion of the court having been invoked, its action in awarding a new trial could be reviewed in the proceeding before this court only on the ground of lack of power to make any such order, and not because the facts shown to the court might not justify the exercise of such discretion in favor of the motion, if the court had any power whatever to entertain it.

This court said:

" The twenty-fourth section of the Judiciary Act of " 1789 governs the practice in cases brought up and re- " viewed in this court. It is bound to give such judgment " as the court below ought to have given, and the law

" directs that a mandate shall be sent down to have the " judgment entered as final in the lower courts when it is " for the defendant below, as here. The District Court " had no power to set aside the judgment of the Supreme " Court, its authority extending only to executing the " mandate."

This case can not be distinguished from that now before this court upon the ground that the Illinois statute permits a new trial as matter of right, whereas, by the Iowa statute, then construed by this court, such new trial is allowed, without cause, only in the discretion of the court. For in that case this court held expressly that the trial court was wholly without power to act upon the judgment of this court, and that the statute applied only to judgments of the trial court.

So, it was held by Judge Wallace, that the Circuit Court cannot entertain a motion for a new trial upon the ground of newly discovered evidence, after mandate from this court, directing final judgment for the plaintiff.

John Hancock Ins. Co. v. *Manning*, 7 Fed. Rep. 299.

This case illustrates the point that the judgment entered in pursuance of the mandate of this court is not in any ordinary sense the judgment of the court which enters it, but is in substance the judgment of the Supreme Court, and not subject to the ordinary incidents of a judgment entered in the trial court.

Indeed, in the opinion this language also was used: " In granting the new trial the District Court seems to have " been governed by two reasons. First, because the " statutes of Iowa prescribed that a second trial may be

" had *of course* in actions brought for the recovery of real " estate."

The court treated the case as if this statute secured a statutory right absolutely to the defeated party to have the judgment against him in the trial court vacated.

Such is also the clear intimation of the Supreme Court of Illinois in *Lowe* v. *Foulke*, 103 Ill. 58.

In that case the plaintiff having recovered a judgment in ejectment in the court below for more land than the proof showed him to be entitled to, it was held that the Supreme Court could not on appeal allow him to file a remittitur and render final judgment for the plaintiff for the land to which he was entitled, because the defendant was entitled to a new trial under the statute at any time within a year from the date of the judgment below, which time had not then expired. In announcing this conclusion, the court said:

" Should final judgment be entered in this court, such " as it might be thought the Circuit Court should have " rendered on the evidence, the anomalous condition " would appear of a final judgment in this court standing " unvacated, and yet the case being tried *de novo* in the " Circuit Court, where a different judgment might be ren- " dered. This ought not to be. It is the judgment of the " Circuit Court defendant may have vacated under the " statute, and not an original and different judgment in " this court. The statute has not provided he may have " an original judgment in this court vacated, as the judg- " ment in the Circuit Court of ejectment may be."

In that case the court plainly held that the final judgment should not be entered there, because if it were it could not be vacated on motion of the defendant in the court below, and that as the year had not expired within

which he was entitled to have the original judgment vacated, he might desire to avail himself of that statutory right, and therefore the Supreme Court ought not by rendering a judgment for the plaintiff, which was unassailable in the court below, to cut him off from the exercise of this right. This case is followed in a later case.

Strean v. *Lloyd*, 128 Ill. 493.

The Supreme Court of Michigan acted upon similar views where it expressly reserved the right of a party to move for a new trial under the statute.

Yelverton v. *Hilliard*, 38 Mich. 355.

In that case the court reversed a judgment in favor of the defendant on the findings of the court below, but did not enter judgment for the plaintiff, remanding the case to the court below to award the proper judgment in his favor, but with directions to save to him his statutory right to move for a new trial.

In both of these cases the courts of last resort held in effect that their judgments were not subject to be vacated or in any way impaired by the action of the courts upon whose proceedings they sit in review; but, upon considerations which it would have been competent for this court to weigh when this case was here, held that, as their judgments could not be superseded by any action in the courts below, they would not render judgments which should cut off the defeated party's statutory right.

It is true that the Supreme Court of Iowa, in the case of *Butterfield* v. *Walsh*, cited by plaintiff in error, seems to have taken the view that a judgment entered in the court below upon a mandate of that court might be vacated under their statute. But this is not sufficient to

outweigh the authority of the decisions of this court, as well as of the Supreme Court of the State of Illinois.

The question now presented seems to turn wholly on the construction and effect to be given to the judgment of this court at the last term. This court is not sitting as an appellate court to review that judgment. No application to correct or modify it is now pending. The question is whether it has been properly executed by the Circuit Court. It is entirely competent for this court, in reversing a judgment at law rendered by a Circuit Court, to send the case back to that tribunal for a new trial. Where, however, the case is remanded with directions to enter a specific judgment, necessarily this is a denial of any right to a new trial.

It is idle for the Circuit Court to go through the form of entering a judgment for the plaintiff, and then to vacate it the next day at the instance of the defendant. What the plaintiff was entitled to in this case, on filing the mandate of this court, was a substantial and not a formal compliance therewith. He was entitled to a final judgment settling the controversy between him and the defendant, absolutely and conclusively. It cannot be denied that if this court by its judgment had specifically directed that no new trial should be granted, as of right or otherwise, such direction would have been conclusive on the Circuit Court, and have fully justified its order on which error is, in this proceeding, assigned. It would have been no answer to say that this court had no power to give this direction. It is the prerogative of this court not merely to declare the law in cases coming before it, but to mistake the law. This follows because of the supreme and absolute character of the jurisdiction exercised by this tribunal. It is thought that the judgment

in this case ought to be read as if such specific direction were found in it.

But obviously the statute has no application. The judgment entered on the mandate of a Supreme Court is not in the ordinary sense a judgment either on default or verdict. That language refers to a judgment rendered by the court of first instance, the court in which the default was entered or the verdict returned. The statute authorizes the trial court to set aside its own judgment but not the judgment of a superior or appellate court. It was not intended by this statute to prevent an appellate court in a proper case from rendering a final judgment. This is clearly indicated by the cases cited.

It is further to be observed that an order setting aside the judgment entered in pursuance of the mandate of this court, and awarding a new trial of this case, could not annul the judgment of this court. That stands a solemn adjudication on the rights of the parties, final and conclusive so long as the facts on which it was rendered are not varied. If the Supreme Court of Illinois hereafter decide in substance that this judgment is erroneous in law, that does not impair it. If the great court which pronounced it should conclude that it was unsound it would so declare in every case coming before it except this. But in this case its final and deliberate judgment has been pronounced, and the record is closed. Upon the same facts the judgment of this court must in the same case ever be the same.

Should a new trial be granted the plaintiff could nevertheless in any other litigation plead there the adjudication of this court as settling the law of this case between these parties, on the facts as shown in this record. If State courts declined to so regard it, the record of their

proceedings could then be brought, by writ of error, to this court.

If the legal propositions above asserted are sound, then it is idle to grant the defendant a new trial. Not only so, but it is at once apparent that he is not entitled to it under the statute, and that this court intended to settle the rights of the parties herein, and to render a final judgment in the case. It is for the court of last resort to say whether the case before it is one in which it ought to direct a final judgment; and where, in the exercise of its undoubted powers, it enters such a judgment, that is not a judgment "upon default or verdict," over which, under the statute, the court below has any power.

An examination of the opinion of this court in this case, as shown in the record, indicates that the court recognized that there were two conflicting titles; that the evidence as to those titles was substantially documentary and appeared to have been fully adduced on both sides, and that it was a proper case for a final judgment, fully settling the rights of the parties; and, although the case below was ejectment, the court passed upon the title of the defendants, and in doing so employed this language:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment, and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining prop-

" erty to his action of ejectment and plenary proof of his " own title, is a cause of vexatious litigation which ought " not to be created or sanctioned."

This seems to involve the decision of a question of federal law upon which this court might well be regarded as the final arbiter. Why then, should the Circuit Court be permitted to vacate the final judgment of this court in a case turning wholly upon questions of law, and those of such a character that the judgment of this court is absolutely final and conclusive upon them? For if the defendant took no title by the survey of 1874 and subsequent patents, as this court has clearly decided, that eliminates him from the case, and whether the plaintiff gets judgment for more or less land than he is entitled to does not in the least concern him.

It is apparent, therefore, that the judgment of this court was intended as a final judgment in the case, and ought not to be treated as such a judgment, within either the letter or the spirit of the statute, as may be set aside by the trial court.

The authorities are plain that a judgment of this court, or other court of last resort, is an adjudication conclusive and binding in that case, whenever it is again presented to the court on substantially the same record. This is held on an exhaustive review of the cases by the Supreme Court of Indiana.

Dodge v. *Gaylord*, 53 Ind. 365.

It is there said, among other things:

" The question under examination has received very " careful and elaborate consideration by the Supreme " Court of Wisconsin in a large number of cases, and the " ruling has been firm and uniform, and has been to the

" effect that the decision of the Supreme Court, though " erroneous, was conclusively binding upon the parties and " the court upon a second appeal; that while the doctrine " of such case might be reconsidered and overruled in " another case, it could not be varied or departed from " in the same case."

This rule is strictly held in Illinois.

Smyth v. *Neff*, 123 Ill. 310.

Union Natl. Bank v. *International Bank*, 123 Ill. 510–517–18.

So it was held, where a plaintiff took a new trial under the statute, after a judgment for the defendant in ejectment, which had been affirmed by the Supreme Court, and on the second trial the evidence of title was the same as on the first trial, that the judgment of the Supreme Court on the second appeal must be the same as upon the first appeal, and that the decision upon the first appeal was *res adjudicata*.

Miller v. *Pence*, 131 Ill. 122.

So it is held that, where this court has first decided a question under State law, it will not, even in another case between different parties, surrender its convictions on account of a contrary subsequent decision of a State court.

Rowan v. Runnels, 5 How. 139.

Pease v. *Peck*, 18 How. 595–599.

Burgess v. *Seligman*, 107 U. S. 20, 33–4.

In a note appended to the latter case, at page 34, all the cases in this court on this point are cited.

And it is also held that a decision of this court is a

conclusive judgment, binding the parties whenever their rights come up for adjudication on the same facts.

Corning v. *Troy Factory*, 15 How. 45.
Sizer v. *Many*, 16 How. 98.
Roberts v. *Cooper*, 20 How. 467.

These and many other cases follow strictly the principles laid down in the Indiana case, that a decision of a Supreme Court is conclusive on the parties in all subsequent proceedings. Other cases cited above demonstrate that this court will not abandon its decision of a question of State law on account of a subsequent contrary decision of the Supreme Court of the State, although the question is presented the second time in new cases and by different parties. Certainly this court could not thus recant on a subsequent presentation of the same case between the same parties, and in the face of a positive rule of law to the contrary. Therefore, it follows that the judgment of this court in this case is conclusive between the parties. If this court grants a new trial it must be on the theory that on such trial, judgment might go for the defendants. In such an event we should have a judgment of this court for the plaintiff, and a judgment of the Circuit Court for the defendants, and necessarily from the nature of this case, on substantially the same facts. To avoid such an anomaly the Supreme Court of Illinois, in *Lowe* v. *Foulke*, 103 Ill. 58, *supra*, declined to enter judgment for the plaintiff so as not to thus cut off the right of defendant to a new trial. But in this case, this court, on what it is thought are most tenable grounds, passed finally and absolutely on the questions in this case, and settled the rights of the parties, and it has cut off any right to a new trial by defendant. Clearly this right might have been

saved by special reservation as in other cases cited. But no such reservation was made in this case, and the presumption is, and is conclusive, that the court did not deem this a case where such right ought to be saved, but in the exercise of its undoubted powers chose rather to render final judgment, and thus fix absolutely the rights of the parties.

The defendant has had his day in court, his rights have been ably and elaborately argued, fully considered and finally adjudicated by the highest court in this country, and that, too, the tribunal of his choice. He is not entitled to prolong this controversy further, and the judgment of the Circuit Court denying his motion for a new trial ought to be affirmed.

It is sometimes said that the provisions for new trials in actions of ejectment found in the statutes of various States are inspired by an appreciation of the sanctity of titles to real estate which requires that they should not be conclusively determined by the result of one trial; and it is said that this is founded on a wise policy, and that these statutes ought to be liberally construed to effect their object. It is not thought that this suggestion is entitled to very much consideration. The controversies involved as to personalty at present are perhaps as important and of quite as great magnitude as those in which the legal title to real estate is involved. But especially is it true that all great controversies, whether touching realty or chattels, seem to tend naturally toward courts of equity. In most States, and in Illinois to some extent, legal title may now be litigated in equity, and the result of one hearing is conclusive. Nor do our statutes contemplate any re-hearing, except in accordance with the settled practice of courts of equity. Indeed, this court has already noted

the policy of the Western States at least, touching litigation affecting titles and the supposed sanctity of land titles. Mr. Justice MILLER remarked in a case where this subject was presented to the consideration of this court:

"As regards the particular question before us, there "is a great difference in the different States in the value "attached to real estate, and to the title by which it is held, "as compared with other species of property. But no "doubt is entertained that in all of them the feeling is far "removed from that which formerly prevailed in England, "or which prevails there even now. While some of our "older States still uphold many of the safeguards of the "common law, with its complicated system of conveyanc- "ing, operating as a strong drag upon the facility and fre- "quency of transfers of real property, our Western people "traffic in land as they do in horses or merchandise, and "sell a quarter section of land as readily and as easily as "they do a mule or a wagon. The laws of the people "correspond with their habits. Deeds of conveyance are, "by statute, rendered exceedingly simple and effectual, the "main safeguard being a well digested system of registra- "tion. In consonance with this general facility of traffic, it "is their policy to prevent those endless litigations con- "cerning titles to land, which, in other countries, are "transmitted from one generation to another. The rapid "settlement of a new country requires that a title once "fairly determined shall not be again disturbed as between "the same parties."

Miles v. *Caldwell*, 2 Wall. 35, 43, 44.

This extract may be taken to be fairly declaratory of the policy of the Western States generally, including Illinois; and it is not thought that the interests of the citizens of this State require that litigation concerning titles

to land should be prolonged by any particularly liberal construction of statutory law.

The tendency is for all litigation to linger too long in the courts, while the spirit of modern jurisprudence requires that decisions should incline rather to speedy and expeditious determination of legal controversy than to its protraction, on the theory that repeated controversies and repeated re-examinations of the same question are necessary in order to the accomplishment of substantial justice. Quite the reverse is true, and many a litigant has found victory, at the end of years of litigation, more destructive than a prompt and crushing defeat would have been.

There is also this further idea to be suggested. If it should be claimed by plaintiffs in error that until the entry of the present judgment, June 12, 1891, they had no opportunity to take a new trial under the statute, a glance at the transcript of this record will show that such a position is by no means tenable.

On the 1st day of February, 1886, the original judgment was rendered in the case, and that judgment was *against the defendants*—the plaintiffs in error here—and therefore the very moment that judgment was rendered their case was ready for the exercise of their right to have the same vacated, and a new trial as a matter of right.

They have no right whatever to have a new trial as to this part of the land in controversy. Their first application for such new trial was made June 13, 1891, more than five years after the first judgment against them for this tract was rendered. It is true, in the interval, that judgment was reversed by this court, and another judgment entered against them for all the lands in suit.

But it would be a hardship to impose upon a plaintiff the re-trial of a case as to land awarded to him in the court

below as a penalty for having successfully prosecuted a writ of error in this court to reverse that judgment as to other lands. In other words the plaintiff in this case would thus be, as to the 4.53 acres, in a worse condition through the favorable judgment of this court than he would have been if unsuccessful here. In no event ought a new trial to be granted as to this piece. The defendants having been beaten once, and by lapse of time lost their right to a new trial, they are supposed by another defeat to have in some way regained this right. The anomalous results that would accordingly flow from attempting to apply the statute under discussion to this case indicate its entire inapplicability.

Respectfully submitted,

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Counsel for defendants in error.

JAN 12 1892
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

JABEZ G. SMALE ET AL.,
Plaintiffs in Error,
vs.
CHARLES H. MITCHELL,
Defendant in Error.

On certificate from the United States Circuit Court of Appeals for the seventh Circuit.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM PRESCOTT,
COUNSEL FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

At the October Term, 1890, of this court, in the case of *Mitchell* v. *Smale*, 140 U. S., 406, a decision was rendered reversing the judgment of the trial court—the Circuit court for the Northern district of Illinois—and the usual mandate issued directing the Circuit court to enter a judgment in conformity with the opinion of this court. The opinion and mandate left nothing whatever to be done but the entry of a judgment awarding to the plaintiff, Mitchell, the land claimed by him in his amended declaration.

Mitchell v. *Smale, supra.*

The Circuit court on July 12, 1891, entered the judgment precisely in conformity with the opinion. (Printed record, p. 1.)

Steps were immediately taken by the plaintiffs in error by motion, and upon the payment by them of costs in the Circuit court, to vacate the judgment just entered and to procure a new trial of the cause under the statute of Illinois relating to new trials in ejectment as a matter of right.

The Circuit court denied the motion to vacate the judgment and to grant such new trial. Plaintiffs in error thereupon sued out a writ of error and removed the case into the Circuit Court of Appeals of the seventh circuit for review. The cause was there argued, and is now before this court upon a certificate as provided by Sec. 6 of the act creating the Circuit Court of Appeals.

It would, therefore, seem that the precise question for determination is, Did the Circuit court err in thus denying the motion to vacate the judgment?

But in a larger sense there would seem to be involved the question of the power of courts of inferior jurisdiction over the final judgments and decrees of appellate courts, and, as in this case, courts of last resort.

This statement, of course, implies the assumption that the judgment so entered by the Circuit court June 12, 1891, and so sought to be vacated, was a final judgment of this court, and not a judgment of the Circuit court.

This is precisely the understanding counsel has of the character and effect of this judgment, and therefore, in the nature of things, and as a matter of plain logic and reason, the Circuit court should have no power or right to vacate, annul, modify, or impair it in any manner whatever.

The authorities in support of the position we have

taken seem to be very numerous, and may be said to be quite uniform throughout the United States.

In our own state, among others, are the following cases:

Chickering v. *Failes*, 29 Ill., 294.
Winchester v. *Grosvenor*, 48 Ill., 515.
Boggs v. *Willard*, 70 Ill., 315.
Wadhams v. *Gay*, 83 Ill., 250.
Hook v. *Richeson*, 115 Ill., 431.
Gage v. *Bailey*, 119 Ill., 539.

In *Chickering* v. *Failes*, *supra*, in speaking of the effect of the various dispositions of cases coming before it for review, and, after quoting that portion of the practice act governing the Supreme court in matters of this character, and which is as follows: "The Supreme court, "in case of a partial reversal, shall give such judgment "or decree as the inferior court ought to have given; or "remand the cause to the inferior court for further pro- "ceedings, as the case may require." The court says at page 302:

"When the decree is affirmed in all its parts, the "controversy is at an end. When the decree is reversed "and the cause is remanded with specific directions, the "court below has no discretion, but must pursue the man- "date of the Appellate court. If such instructions were "not observed, it would be error for which the second "decree would be reversed on appeal."

In the case of *Boggs* v. *Willard*, *supra*, Mr. Justice Walker, in delivering the opinion of the court, said, at page 316: "In numerous cases it has been held in this "state that where a case has been tried in this court and "remanded with specific directions to dismiss the bill, or

"do some other act, the court below has no power to do "anything but carry out the specific directions."

Citing,

Chickering v. *Failes*, 29 Ill., 294.
Winchester v. *Grosvener*, 48 Ill., 515.
Hollowbush v. *McConnell*, 12 Ill., 203.

The court proceeds: "The statute, R. S. 1845, page "420, empowers this court to give final judgment and "issue executions, or remand the cause that execution "may issue, or that other proceedings may be had thereon. "Had we, in the case, when it was before us, rendered a "final decree dismissing the bill, no one would have "claimed that the suit was pending thereafter, or that "there had not been a final hearing or trial. And why? "Because this court had considered the evidence as ap- "plied to the pleadings, and had fully determined the "rights of the parties as presented by the case. And in "what does *the decree rendered in this court* differ from "a decree of dismissal?"

"We, after fully considering the pleadings and evi- "dence, decided that the complainant had not shown a "right to the relief sought, and that the court below "erred in not dismissing the bill, and then reversed the "decree, and remanded the cause for further proceed- "ings in conformity with the opinion.

"Under such specific directions the court below could "only act in conformity with the opinion, and dismiss the "bill. All the questions had been finally heard, tried and "decided on the appeal in this court. If the *decree of this* "*court* did not finally determine the case in all of its parts, "it is impossible for us to comprehend how a case can be "finally heard and tried, to maintain this writ, or to permit "other and further proceedings than those directed by this "court, would be to hold these controversies could never

"be ended by judicial sentence or decree. * * *
"As to the second assignment of error, it is only necessary
"to say, that the court below conformed its action strictly
"to the mandate of this court, and if its action was errone-
"ous, it was because we had erred in deciding the case
"and finally determining the rights of the parties.

"*It is in effect assigning an error on the decision of*
"*this court.* * * *"

There are, also, numerous decided cases of this court indicating the effect to be given to decisions in cases of remandment to trial courts.

Stewart v. *Solomon*, 97 U. S., 361.
Humphrey v. *Baker*, 103 U. S., 736.

In the first case, *Stewart* v. *Solomon*, in the course of the opinion which was delivered by Mr. Chief Justice WAITE, it is said: "An appeal will not be entertained by
"this court from a decree entered in the Circuit or other
"inferior court, in exact accordance with our mandate
"upon a previous appeal; such a decree when entered is
"in effect our decree, and the appeal would be from our-
"selves to ourselves. If such an appeal is taken, how-
"ever, we will, upon application of the appellee, exam-
"ine the decree entered, and if it conforms to the man-
"date, dismiss the case with costs. If it does not, the
"case will be remanded, with appropriate directions for
"the correction of the error. The same rule applies to
"writs of error. This is not intended to interfere with
"any remedy the parties may have by mandamus. This
"is an appeal from a decree entered upon our mandate.
"No complaint is made as to its form, and it seems to be
"in all respects according to our directions. The effort
"of the appellant was to open the case below, and to ob-
"tain leave to file new pleadings, introducing new de-

" fenses. This he could not do. The rights of the par-
" ties in the subject-matter of the suit were finally deter-
" mined upon the original appeal, and all that remained
" for the Circuit court to do was to enter a decree in ac-
" cordance with our instructions, and carry it into effect."
* * *

It may be contended by counsel for plaintiffs in error that while the position here assumed is correct with respect to cases in general, yet that it does not apply to actions in ejectment, where judgments are vacated and new trials are by statute allowed as a matter of right, but that in such cases there is in some way some exception whereby a judgment, which would in other cases be a judgment of this court, becomes a judgment of the lower court, and thus liable to be annulled and set aside upon mere motion and payment of costs, which could not be done, as we have seen, if it were a judgment of this court.

It is obvious plaintiffs in error must assume this position in order to prevail in this controversy, and procure the vacation of the judgment, or else successfully assail our first position and show that notwithstanding the judgment in question is a judgment of this court and not of the lower court, still it may be vacated upon mere motion precisely as if it were a judgment of the lower court. Or it is possible that it will be contended that the judgment in question is an *anomalous* judgment—a species of *interlocutory* judgment as it were—and that therefore whether it be a judgment of this court or a judgment of the Circuit court, in either event it may be vacated upon motion. In any event we suggest that the following decided cases furnish a complete answer to such contention :

Ex parte Dubuque & Pacific R. R. Co., 1 Wall., 69.
Lowe v. *Foulke*, 103 Ill., 58.
Strean v. *Lloyd*, 128 Ill., 493.
Yelverton v. *Hilliard*, 38 Mich., 355.
Chautauqua Co. Bank v. *White*, 23 N. Y., 347.

The section of the statute of ejectment providing for the vacation of judgments, etc., so far as it relates to the point under consideration, is as follows:

"SECTION 35. At any time within one year after a "judgment, either upon default or verdict in the action of "ejectment, the party against whom it is rendered, his "heirs or assigns, upon the payment of all costs recov- "ered therein, shall be entitled to have the judgment "vacated, and a new trial granted in the cause." * * *

Starr & Curtis Stat., Vol. 1, p. 989.

The statute further provides, "the court, upon subse- "sequent application made within one year after the render- "ing of the second judgment in said cause, if satisfied that "justice will thereby be promoted and the rights of the "parties more satisfactorily ascertained and established, "may vacate the judgment and grant another new trial; "but not more than two new trials shall be granted to "the same party under this section."

Prior to the year 1845, the common law rules in relation to actions of ejectment prevailed in Illinois; but subsequently, as already stated, the action has been a statutory one; and so far as the subject of new trials, as of right are concerned, there has been but little change in the statute since.

It will probably be contended by plaintiffs in error, that inasmuch as this statute of ejectment was in some way a great innovation upon certain superstitious reverences entertained for landed property and the rules governing it, growing out of the feudal system, that great liberality has been accorded to litigants, especially in regard to new trials under this statute.

This section of the statute respecting new trials came early, after its enactment, before the Supreme court of the state, for construction; Among the first cases was that of *Emmons* v. *Bishop*, decided at December Term, 1852. The opinion in this case was delivered by the late Judge Treat, confessedly one of the most conservative, as well as one of the best judicial minds the State of Illinois has ever produced; and this is what is said:

"This privilege of a new trial is conferred on the "party as a matter of grace and favor, and he must in- "sist upon it within the time specified.

"He must ask for and obtain a new trial within the "year. If he does not, he waives the benefit of the "statute."

Emmons v. *Bishop*, 14 Ill., 152.

This was early followed by the case of *Gibson* v. *Manly*, 15 Ill., 140.

In the opinion in that case which was by Mr. Justice CATON, it is said. "The first new trial is given to "the losing party as a matter of right upon the payment "of costs and damages, if applied for within that time "(a year) and the court may in its discretion grant a "second trial within the year after the second judgment. "Upon this statute alone does the power of the Circuit "court depend for granting new trials after the close of

"the term, at which the judgment is rendered, and when "exercised, it must be done in pursuance of the statute, "and not otherwise."

From this it would appear that so far from the permission of any great liberality the statute in this respect has been rather strictly construed, and it will be found in almost every reported case in Illinois wherein the question has been raised, that a strict, rather than a liberal construction has been applied to this section, particularly in respect of the time within which the application for the vacation of the judgment is to be made and new trial granted.

But as the question for determination here rests solely upon the laws and rules of practice, governing this court and not upon the rules of practice, governing the state courts, it can make but little difference whether the statute in question has received a liberal or illiberal construction.

Nevertheless, if this court should, as a matter of comity, or favor, or otherwise, turn to the laws and decisions of the courts of the state to see what those laws are and what the course of decisions of the courts have been respecting matters like this, nothing whatever, it is thought, would be discovered more favorable to the contention of plaintiffs in error than is afforded by the laws and practice governing this court.

On the first day of ~~January~~ February, 1886, the original judgment was rendered in this cause. That judgment was *against* the plaintiffs in error, unquestionably, and not disputed, against them to the extent which entitled them to have the same vacated and a new trial granted as a matter of course. True, the judgment was not quite *so much*

against them as the judgment of this court entered in the Circuit court on the 12th June, 1891, and now sought to be vacated, but nevertheless the statutory right to move for the vacation of the judgment was complete and perfect on the first day of February, 1886. That was the judgment, as we contend, which the plaintiffs in error should have had vacated and a new trial granted. But they were satisfied to allow that judgment to stand against them and take the chances of a reversal to their prejudice by this court, or, in other words they were willing to take the chances of having a *larger* judgment rendered against them, and they therefore waived their right to have the first judgment against them vacated, and a new trial ordered. They not only waived their right to a new trial under the statute, but they *positively declined and refused, and prevented* a new trial at that time. Printed Rec., page 16.

But now, after the lapse of a period of five years from the rendition of that judgment, and about nine years from the commencement of the suit, and having thus taken their chances with the defendant in error in this court, and *lost*, they come at this remote period and insist upon or invoke that degree of liberality which will permit them to take the new trial *now*, which they positively refused after the rendition of the judgment of the trial court.

Would such liberality promote justice? We submit that it would rather result in the perversion of justice.

When the legislature of Illinois abolished the ancient practice of ejectment and introduced a statutory method, it was supposed that it would result in the remedying of a great evil, which was the inconveniences and the almost interminable delays in the settlement of disputes arising

on questions relating to titles to land. It was wisely *intended* by the legislature, by the adoption of this statute to afford the means of a safe and *speedy* settlement of controversies of this character—*the reason for the rules*, applicable to the old actions of ejectment, affected, as they were, by incidents growing out of the feudal system, having failed, it was supposed *the rule itself would fail.*

But if the position of plaintiffs in error is to be sustained, when will there be an end of this suit?

It would make it possible for the granting *four* new trials—two to each party—and that, too, in every instance after the original judgments had been in review before the appropriate Appellate court, as in the present case. If, from the commencement to the close of each case, as much time should be consumed as has been consumed in this case, very nearly fifty years would elapse before its final termination would be reached.

If this be so, how much has the statute improved the common law?

Under the old law, when these trials had reached a reasonable limit, a court of equity might interpose to stop the litigation, but here nothing could restrain the repetition of these trials but the limit to the physical or financial endurance of the parties.

When, therefore, the subject of controversy is a small and comparatively valueless tract of land, as in this case, it would be far more profitable for the true owner, to at once make a conveyance of the disputed property to his adversary and abandon his suit.

It may also be contended or at least suggested by counsel for plaintiffs in error that there is a suit now pend-

ing in the state court, involving questions similar to those in the case of *Mitchell* v. *Smale et al.*, and which are questions of local law, and, therefore, ought to be determined, in the first instance, by the state court, but which cannot now be done, by reason of the binding effect of this judgment upon the state court. That, therefore, this judgment should be opened or vacated, and thus enable the state court to pass upon these supposed questions of local law untrammelled thereby.

The questions of local law involved in the cases now pending before the state court, relate to the ownership of the fee in the *bed* of the lake on which the land claimed by Mitchell in the suit of *Mitchell* v. *Smale et al.*, abutted.

Mitchell in that suit, neither by his pleadings nor in any other manner, claimed title in fee in the *bed* of the lake or any part thereof, but only claimed title in fee in the unsubmerged land.

Mitchell v. *Smale*, 140 U. S., 406 at 410.

The principal question determined by this court in that case, so far from being one of local law, was, in fact, as counsel understands it, a question of federal law, namely, the validity and extent of a grant of a tract of land—part of the public domain, not the bed of a lake or otherwise submerged—by patent from the officers of the Government of the United States to an individual.

It is obvious, therefore, that the state court is not restrained or controlled in its determination of the question of local law, pending before it, by the fact of the existence of the judgment here in controversy.

It is therefore, respectfully suggested that the fact of the pendency of such suits in the state court ought not to

have the slightest influence upon this court in the determination of the question now before it, going, as it does, solely to the power and authority of the Circuit court to vacate and set aside a final judgment of this court, and award a new trial.

WILLIAM PRESCOTT,
For Deft. in Error.

FILED.
JAN 12 1892
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

JABEZ G. SMALE ET AL.,

Plaintiffs in Error,

vs.

CHARLES H. MITCHELL,

Defendant in Error.

Error to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF THOMAS DENT, OF COUNSEL FOR GERTRUDE H. HARDIN, WHO IS INTERESTED IN THE QUESTION PRESENTED IN THIS CASE.

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BRIEF OF THOMAS DENT, OF COUNSEL FOR GERTRUDE H. HARDIN, WHO IS INTERESTED IN THE QUESTION PRESENTED INTHIS CASE.

MAY IT PLEASE THE COURT:

Being advised that the counsel of the plaintiffs in error will wish to apply the decision herein, if it should be favorable to them, to the case of *Jordan* v. *Hardin*, heretofore heard in this court, and now pending in the Circuit court of Appeals for review of the action of the trial court in denying a motion for a new trial, which, if allowed, would be a third trial in that case, permission is respectfully asked to present one or two considerations which seem to be pertinent to the question whether the Circuit court erred in refusing to grant a new trial in the present case.

It is not understood that any error is assigned in respect to the carrying out of the mandate of this court, but it is urged that when judgment was entered pursuant to such mandate, the Circuit court was bound to stay proceedings and grant a new trial because of the motion for that purpose made by the defendant, intervening between the entering of the judgment and the suing out or execution of a writ of possession.

The transcript shows, among other things, that an ejectment suit was brought in a state court by *Mitchell* v. *Smale and others;* that the defendants caused it to be removed to the Circuit court of the United States for the Northern district of Illinois; that such removal was opposed by Mitchell; that a trial was had in the latter court before his Honor Judge Gresham in July, 1885, a jury being waived; that the court gave judgment for the plaintiff as to a certain part of the premises claimed, and for the defendant as to the residue; that the court made special findings; that a writ of error was prosecuted by Mitchell, and that the Supreme court reversed the judgment and remanded the cause with instructions to enter judgment for the plaintiff Mitchell. The binding force of the judgment rendered by the Circuit court in pursuance of the opinion and mandate of the Supreme court is questioned, and it is gravely argued that the Circuit court, instead of issuing a writ of possession, should vacate the judgment and allow a new trial.

I.

Generally motions for new trial are not within the revisory power of the Circuit court of Appeals, any more than they have been within the revisory power of this court.

Phillips' U. S. Sup. Court Practice, 83.

It is, therefore, incumbent upon the plaintiffs in error to show in support of their contention, an exception to the general rule upon this subject.

The writ of error from the Circuit court was, again, a step in the direction of asking for a modification of the directions given by this court in remanding the cause to the Circuit court. But it is understood that this court has invariably refused all applications for rehearing made after the adjournment for the term at which the judgment has been entered.

Hickman v. *City of Fort Scott*, 141 U. S., 415.
Phillips' Practice, 366.

II.

THE CASE IS GOVERNED BY THE GENERAL RULE THAT A JUDGMENT RENDERED BY DIRECTION OF THE SUPREME COURT OF THE UNITED STATES IS TO BE CARRIED INTO EXECUTION, AND SHOULD NOT BE SET ASIDE BY THE CIRCUIT COURT.

The argument of counsel for plaintiffs in error must be that an ejectment case is *an exception to this general rule.*

It must be apparent, however, that the case is, first of all, to be viewed with reference to the practice of this court, under the acts of Congress. That practice is illustrated by *City of Fort Scott* v. *Hickman*, 112 U. S., 150; and its effect in actions for real property is shown by *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 1 Wallace, 69; S. C., 7 Wallace, 270.

The former of these cases shows that it was especially proper for the Supreme court to direct a judgment upon

the special findings; and whether or not such a practice would have been adopted by the Supreme court of the state is immaterial in respect to the matter now in hand.

The latter case shows that the judgment entered in the Circuit court by direction of the Supreme court is practically and in effect a judgment of this court; one which is not subject to be set aside by the Circuit court, but which, on the contrary, should be carried into execution by that court, according to the mandate given it.

Dubuque & Pacific R. R. Co. v. *Litchfield, supra*, is instructive in several particulars applicable to the case at bar, and is entirely decisive of the present writ of error, and shows a want of jurisdiction or power in the Circuit court to vacate the judgment.

The original report of the Litchfield case in 23 How., 420, shows that judgment was rendered in the District court of the United States for the District of Iowa in favor of Litchfield, who had brought an action to try the title to a certain section of land in Iowa. The Supreme court in reversing that judgment directed the court below to enter judgment for the defendant in the court below, to wit: the Dubuque and Pacific Railroad Company.

The case in this regard is briefly stated in the opinion by Mr. Justice Catron, in 1 Wallace, 69. The effect of the mandate was there considered. It had been construed by the court below as merely entitling the defendant to a formal judgment, in pursuance of the directions of the Supreme court, but not to a final judgment in the sense that it was to be carried out or executed without being influenced or affected by the Iowa code. Holding such views, the District court, after entering judgment for the defendant, in accordance with the mandate, allowed

the plaintiff, Litchfield, to pay the costs and take a new trial, in pursuance of a provision of that code.

The reasoning in the District court, as the learned judge states, was, that a second trial might be had, of course, and also that after the cause had proceeded to the entry of a judgment of reversal, it stood on the same footing as it would have done had judgment been entered for the defendant before the cause was removed to the Supreme court. But this court held that this was not the correct view, and that the "District court had no "power to set aside the judgment of the Supreme court." Therefore a mandamus was awarded "to the Circuit court "of the district of Iowa, commanding it to erase and va- "cate the order granting a new trial," and further commanding "that a judgment be entered in conformity to "the mandate of the said Supreme court."

It is manifest that the same arguments were used in that case which have been used in the present case. The counsel who maintained the right of the District court to award a new trial, argued there, as will be argued here, that the Supreme court should not have given directions for a final judgment, and especially should not have controlled the *power or statutory discretion of the District court* in reference to granting a new trial. But the argument was unavailing.

It is to be especially observed, also, that this court treated the judgment rendered in the District court in pursuance of the mandate as being practically and in effect "*the judgment of the Supreme court*" itself, thus sustaining the view which may be supported by the counsel of Mr. Mitchell, that a new trial which is subject to be allowed as of course under our statute is from a judgment *not directed by the Supreme court, but* "*upon*

"*default or verdict*" *in the trial court alone.* The judgment which this court directed was either a judgment of this court or a judgment dating back to the time of the original judgment.

There is no practical distinction between the attitude in which the District court of Iowa was placed in the Litchfield case and that in which the Circuit court of the United States for the Northern district of Illinois was placed in the case at bar when the mandate was sent down from the Supreme court. Neither of the trial courts was to stop with the mere entry of judgment; for the judgment of itself involved the right to a writ of possession. In express terms our statute provided that on the recovery of judgment the plaintiff shall "be en- "titled to a writ of possession."

Ejectment Act, Revised Statutes of Illinois, Chap. 45, Sec. 42.

The right to such writ was implied in and involved by the judgment which this court directed.

Nor was the authority of the District court of Iowa to grant a new trial, so far as the right to do so depended upon the code of Iowa, less ample as a matter of discretion on the part of the court than is the authority given by the statutes of Illinois, so far as the matter now under consideration is a subject of review. The code of Iowa, if less mandatory than the statutes of Illinois, was yet permissive, and such as would have given full discretion to the District court in respect to a judgment of that court not directed or entered under a mandate from the Supreme court of the United States. Indeed, the latter court treated the matter substantially as if the code had been the same as our own statute, when supposing that

the District court had entertained the idea that a second trial might be had "of course."

Nor is there any reason to suppose that the judgment under consideration, which was directed by the Supreme court under section 701 of Revised Statutes of the United States, should be treated as less effective than if given in pursuance of section 24 of the Judiciary Act of 1789, while that section remained unchanged.

That section is in some respects enlarged by said section 701; for the latter section gives the Supreme court power to direct such judgment "as the justice of the "case may require."

If less mandatory in some respects than was section 24 of the judiciary act of 1789, it is yet, as applied to a case such as is now before the court, ample in the extent of the discretion vested in the Supreme court.

The Supreme court could, upon the record before it, as appears from the opinion of Mr. Justice Bradley, see that the defendant had no title, and that the survey of 1874, on which the defendant's only claim of title was based, was illegal. Therefore, as in the Litchfield case, it was in the power of the court under section 701 Revised Statutes United States, to direct a judgment in favor of the plaintiff, "the justice of the case" so requiring.

III.

THE COMPLAINT TOUCHES THIS COURT, AS TO THE PRACTICE PURSUED, BUT WILL BE FOUND TO HAVE NO FOUNDATION UPON CONSIDERING THE WHOLE RECORD AS PRESENTED TO THIS COURT, NOR COULD THE CIRCUIT COURT PROPERLY HEED IT.

If there had been ground for such complaint, the suggestion of it should have been made to this court at the term at which judgment was given by this court; and there was ample opportunity for it in presenting the petition for the rehearing. Such petition, as may be supposed, did, however, rightly proceed upon the idea that the judgment directed by this court was a *final* judgment, not subject to the incidents which ordinarily apply to judgments rendered upon default or verdict in the trial court.

The cases show that when the Supreme court of Illinois gives directions in an ejectment suit, they are as effective, and as little liable to be disturbed in the trial court, as are directions of that court in any other form of action.

The complaint of the plaintiffs in error as to the practice adopted by this court comes with ill grace for other reasons, also; for it is from parties who chose to remove the cause from the state court. If, therefore, it could be shown that the practice in the courts of the United States has differed, or in the case under consideration does differ, from the practice in the Supreme court of Illinois, it is nevertheless a practice of which the plaintiffs in error may be said to have had notice, and as to the effect

of the judgment entered by direction of this court it is also a practice which was admissible and within the discretion of this court. It is also believed to be in full accord with every sentiment of justice.

Respectfully submitted.

THOMAS DENT,
Attorney for Gertrude H. Hardin.

No. 8. Orig

Supreme Court of the United States. October Term, 1890.

Ex Parte: In the Matter of GEORGE W. DUPRE, Petitioner.

Now comes the petitioner, by his counsel, Thomas J. Semmes and Hannis Taylor, and moves the court for leave to file a petition for writs of *habeas corpus* and certiorari, as hereto annexed.

THOMAS J. SEMMES,
HANNIS TAYLOR,
Counsel for Petitioner.

To the honorable the Supreme Court of the United States:

The petition of George W. Dupre respectfully shows—

1st. That he is and was on the 12th day of February, 1891, and long prior thereto a citizen of the United States and of the State of Louisiana, residing in the city of New Orleans, in said State.

2d. That "The Daily States" is a newspaper which has been printed and published daily and continuously in said city of New Orleans during the period of ten years and more last past; that your petitioner has for many years been connected with the printing and publication of said newspaper, and that he and one H. J. Hearsey, who is and was on and before the 11th day of February, 1891, also a citizen of said State and United States, are and were at all times during more than two years last past owners, printers, and publishers of said newspaper.

3d. That long prior to and on the 11th day of February, 1891, said newspaper was printed and published daily containing an advertisement of the business of the Louisiana State Lottery Co. and of the scheme and drawing of said company offering prizes dependant upon lot or chance, which company was then and there a body corporate created by the laws of the State of Louisiana and authorised by said laws to conduct and draw lotteries and offer prizes dependant upon lot or chance, and the publication thereof was then and there lawful in said State.

4th. That on the 12th day of February, 1891, your petitioner deposited in the post office and mail of the United States at New Orleans, in said State, a copy of said newspaper, "The Daily States," addressed to one A. J. Bachemin, at Baton Rouge, Louisiana, and to be conveyed by said mail and delivered to said Bachemin at the place aforesaid; that said newspaper so deposited contained said advertisement of said lottery company and of said lottery, and was one of the regular edition of said newspaper printed and published as aforesaid on the 11th day of February, 1891, by your petitioner and said Hearsey as aforesaid, and was so deposited in said mail by your petitioner as such publisher and proprietor thereof.

5th. That on the 19th day of February, 1891, the grand jury of the United States, impaneled and sworn, in the circuit court of the United States in and for the eastern district of Louisiana found and

returned into said court an indictment against your petitioner, therein alleging and charging him with having knowingly deposited said newspaper containing said advertisement in said mail, to be conveyed by said mail, in violation of section 3894 of the Revised Statutes of the United States as amended September 19th, 1890; that thereupon, by the order of said court, a *capias* was issued to the marshal of the United States for said district, who, by authority thereof, arrested your petitioner and brought him before said court, where, on the 21st day of February, 1891, he was arraigned and required to plead to said indictment; whereupon he interposed & filed his plea thereto, alleging the facts substancially as hereinabove set forth and alleged; and afterwards, to wit, the 27th day of February, 1891, the United States attorney in and for said district demurred to said plea, and, petitioner having filed his joinder in demurrer, the same was argued and submitted, and thereupon said court, upon consideration thereof, ordered, adjudged, and decreed that said demurrer to said plea was well taken and said plea insufficient and bad, and that petitioner plead over; all of which will more fully appear by the transcript of the record of said indictment and of the proceedings and judgment thereon, hereto annexed and made a part hereof.

6th. That afterwards, upon the same day, the surety upon petitioner's recognizance of bail surrendered him to said court, and thereupon your petitioner was by said court remanded to the custody of said marshal, where he now is, deprived of his liberty under and by color of the authority of the United States and of said court and in violation of the Constitution of the United States and of his rights as a citizen thereof, because he says that he is advised and thereof avers that the statute of the United States under which he is held and being prosecuted upon said indictment is unconstitutional, null, and void and particularly obnoxious to and in violation of the first amendment to said Constitution, which forbids Congress passing any law abridging the freedom of the press, and that therefore said circuit court is and was without jurisdiction in the premises, and he is deprived of his liberty without authority of law.

7th. And petitioner shows that he has by his said plea and joinder in demurrer thereto invoked the decision of said circuit court upon the facts of the case, which he is advised and avers show said court to be withou- jurisdiction in the premises, and said court after a hearing thereof refused to grant him relief in the premises or restore him to his liberty, and that he is without relief in the premises except from this honorable court.

Wherefore petitioner prays that the writ of *habeas corpus* may issue out of this court directed to J. B. Donally, U. S. marshal for the eastern district of Louisiana, commanding him, upon a day therein to be named, to bring before this court the body of your petitioner, together with the cause of his detention, to the end that your petitioner may be discharged from his custody.

And your petitioner further prays that at the same time a writ of certiorari be issued to said circuit court, commanding it to certify forthwith to this honorable court, under the seal thereof, a full, true,

and complete transcript of said record and proceedings against your petitioner hereinbefore referred to, and for all general relief.

GEORGE W. DUPRE.

George W. Dupre, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true.

GEORGE W. DUPRE.

Sworn to and subscribed before me this 27th day of February, 1891.

{ Seal Robert P. Upton, Notary Public, Parish of Orleans, State of La. }

ROB'T P. UPTON, *Not. Pub.*

THOMAS J. SEMMES,
HANNIS TAYLOR,
Counsel for Petitioner.

UNITED STATES
v.
GEO. W. DUPRÉ. } No. 1975.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
GEORGE W. DUPRE. } No. 1975.

Index.

	Page.
Indictment	1
Order to plead	6
Arraignment	6
Special plea	8
Demurrer to plea	10
Joinder in demurrer	11
Judgment on plea and demurrer	12
Commitment	14

UNITED STATES OF AMERICA,
Eastern District of Louisiana.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, Holding Sessions at the City of New Orleans, Louisiana, of November Term, A. D. 1890.

The grand jurors of the United States of America, duly empanelled and sworn, in and for the eastern district of Louisiana, in the said

circuit court, on their oath present that George W. Dupre, late of the eastern district of Louisiana, journalist, on the twelfth day of February, A. D. eighteen hundred and ninety-one, at the said city of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court, unlawfully and knowingly did deposit and cause to be deposited in the post office and in the mail of the United States at the said city of New Orleans, then and there to be carried in and conveyed by the said mail, within the meaning and intent and in violation of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States, a certain newspaper, called "The Daily States," purporting to have been published at the city of New Orleans, of date 11th February, 1891, which said newspaper then and there contained an advertisement of a lottery offering prizes dependent on lot and chance—a more full description of which said newspaper, advertisement, and lottery the jurors aforesaid are ignorant of and are unable to give—contrary to the form of the statute of the United States of America in such case made and provided and against their peace and dignity.

2. The jurors aforesaid, on their oath aforesaid, further present that the said George W. Dupre, on the twelfth day of February, A. D. eighteen hundred and ninety-one, at the city of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court, unlawfully and knowingly did deposit and cause to be deposited in the post office and in the mail of the United States at the said city of New Orleans, to be then and there carried in and conveyed by the said mail, within the meaning and intent of and in violation of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States, a certain other newspaper, purporting to have been published at the city of New Orleans, of date Wednesday, February 11th, 1891, called "The Daily States," the postage whereon was then and there duly paid, which said newspaper was then and there enclosed in a wrapper directed to Mr. A. J. Bachemin, Baton Rouge, La., and then and there contained an advertisement of a lottery offering prizes dependent on lot and chance, to wit, an advertisement of a lottery known as and called "Louisiana State Lottery," as he, the said George W. Dupre, then and there well knew, and which said advertisement is in words and figures as follows, to wit:

UNPRECEDENTED ATTRACTION!
OVER ONE MILLION DISTRIBUTED.

LA. S. L.

Louisiana State Lottery Company.

Incorporated by the Legislature for educational and charitable purposes, and its franchise made a part of the present State constitution in 1879 by an overwhelming popular vote.

To Continue until January 1, 1895.

Its GRAND EXTRAORDINARY DRAWINGS take place semi-annually (June and December) and its GRAND SINGLE NUMBER DRAWINGS take place in each of the other ten months in the year, and are all drawn in public, at the Academy of Music, New Orleans, La.

Famed for twenty years for integrity of its drawings and prompt payment of prizes, attested as follows:

"We do hereby certify that we supervise the arrangements for all the monthly and semi-annual drawings of the Louisiana State Lottery Company, and in person manage and control the drawings themselves, and that the same are conducted with honesty, fairness, and in good faith toward all parties, and we authorize the company to use this certificate, with fac-similes of our signatures attached, in its advertisements."

G. T. Beauregard
J. A. Early

Commissioners.

We, the undersigned, banks and bankers, will pay all prizes drawn in the Louisiana State lotteries which may be presented at our counters.

R. M. WALMSLEY, *Pres't La. Nat. Bank.*
P. LANAUX, *Pres't State Nat. Bank.*
A. BALDWIN, *Pres't N. O. Nat. Bank.*
CARL KOHN, *Pres't Union Nat. Bank.*

GRAND MONTHLY DRAWING

will take place

At the Academy of Music, New Orleans,

Tuesday, February 17, 1891.

CAPITAL PRIZE, $300,000.

100,000 numbers in the wheel.

List of Prizes.

1 prize of	$300,000 is	$300,000
1 prize of	100,000 is	100,000
1 prize of	50,000 is	50,000
1 prize of	25,000 is	25,000
2 prizes of	10,000 are	20,000
5 prizes of	5,000 are	25,000
25 prizes of	1,000 are	25,000
100 prizes of	500 are	50,000
200 prizes of	300 are	60,000
500 prizes of	200 are	100,000

Approximation Prizes.

200 prizes of	$500 are	$50,000
300 prizes of	300 are	30,000
300 prizes of	200 are	20,000

Terminal Prizes.

999 prizes of	$100 are	$99,900
999 prizes of	100 are	99,900
3,134 prizes, amounting to		$1,054,600

Price of Tickets.

Whole tickets at twenty dollars;
Halves, $10; quarters, $5; tenths, $2; twentieths, $1.

Club rates: 55 fractional tickets at $1 for $50.

Special Rates to Agents.

Agents Wanted Everywhere.

Important.

Send money by express at our expense in sums not less than five dollars, on which sums we will pay all charges, and we will also pre-

pay express charges on tickets and lists of prizes forwarded to our correspondents.

Address— PAUL CONRAD,
New Orleans.

GIVE FULL ADDRESS AND MAKE SIGNATURE PLAIN.

Congress having passed laws prohibiting the use of the mails to all lotteries, we use the express companies in answering correspondents and sending lists of prizes until the courts shall decide our rights as a State institution. The postal authorities, however, will continue to deliver all ordinary letters addressed to Paul Conrad, but will not deliver registered letters to him.

The official lists of prizes will be sent on application to local agents, after every drawing, in any quantity, by express, free of cost.

ATTENTION.—The present charter of the Louisiana State Lottery Company, which is part of the constitution of the State and by decision of the Supreme Court of the United States is an inviolable contract between the State and the lottery company, will remain in force under any circumstances UNTIL 1895.

The Louisiana Legislature which adjourned July 10th voted by two-thirds majority in each house to let the people decide at an election whether the lottery shall continue from 1895 until 1919. The general impression is that THE PEOPLE WILL FAVOR CONTINUANCE.

As the tickets of the La. State Lottery Company are prepared with great care and every attention to detail, they will continue to bear the signature of the late M. A. Dauphin until other plates can be carefully engraved with the signature of its new president, Paul Conrad.

There are so many inferior and dishonest schemes on the market for the sale of which vendors receive enormous commissions that buyers must see to it and protect themselves by insisting on having LA. STATE LOTTERY TICKETS and none others if they want the advertised chance for a prize.

—contrary to the form of the statutes of the United States of America in such case made and provided and against their peace and dignity.

3. The jurors aforesaid, on their oath aforesaid, further present that the said George W. Dupre, on the twelfth day of February, A. D. eighteen hundred and ninety-one, at the city of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court, unlawfully and knowingly did deposit in the post office of the United States in the said city of New Orleans, to be carried in and be conveyed by the mail of the United States, within the meaning and intent of and in violation of section 3894 of the Revised Statutes of the United States, a certain other newspaper which then and there contained an advertisement of a lottery offering

prizes dependent on lot and chance, to wit, a newspaper called "The Daily States," contrary to the form of the statute of the United States of America and against their peace and dignity.

(Signed) J. W. GURLEY,
Ass't U. S. Att'y.

Endorsed: 1975. U. S. circuit court. United States *vs.* George W. Dupre. Indictment—violation of postal law relative to lottery circulars, &c., &c., sec. 3894. A true bill. R. Viosca, foreman. New Orleans, 18 Feb'y, 1891. Filed Feb'y 18, 1891.

Motion and Order to Plead. Entered and Filed February 20, 1891.

UNITED STATES
vs.
GEO. W. DUPRE. } No. 1975.

On motion of Wm. Grant, U. S. att'y—

It is ordered that the defendant be notified to appear at the bar of the court on Saturday, February 21, 1891, at 11 a. m., then and there to plead to the indictment found against him in the above-entitled cause.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Feb'y 20, '91, and on the same day I served a true copy of the within motion to plead on Geo. W. Dupre by handing the same to him in person in this city.

New Orleans, Feb. 21, '91.

(Signed) JOSEPH DEVONSHIRE,
D'y Marshal.

Arraignment.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, SATURDAY, *February* 21, 1891.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

UNITED STATES
vs.
GEO. W. DUPRÉ. } No. 1975.

George W. Dupre, the defendant herein, being this day duly arraigned, waived the formal reading of the indictment found against him on the 18th day of February, 1891, and to the said indictment interposed a plea.

Whereupon it was ordered that the said plea be filed.

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
GEO. W. DUPRE. } No. 1975.

And the said George W. Dupre in his own proper person cometh into court here and, having heard the said indictment read, saith that the said United States ought not further to prosecute the said indictment or any of the counts therein against him, because he saith—

That he is and was, on and before said 12th day of February, 1891, one of the publishers and proprietors of the said newspaper named The Daily States in said indictment mentioned, which newspaper is and was wholly printed and regularly issued at stated periods, to wit, daily, from its office of publication, to wit, No. 90 Camp street, in the city of New Orleans, State of Louisiana, which place is well known as its office of publication, whence said newspaper was regularly issued as aforesaid long prior to and was then and there so issued on said 11th day of February, 1891; that said newspaper, The Daily States, was then and there a newspaper in general circulation, having a large number of subscribers thereto residing in various cities and towns in said State of Louisiana and in other States, to whom said newspaper was conveyed in and delivered by the mail of the United States; that the publishers and proprietors thereof were then and there without the means to circulate and distribute the said newspaper to the subscribers thereto otherwise than by and through the mail of the United States, and no other means than said mail then and there existed whereby they could convey to and deliver said newspaper to said subscribers, including the said A. J. Bachemin; that said newspaper in said indictment mentioned was one of the regular editions of said Daily States, printed and published on said 11th day of February, 1891, and was deposited in said post office and mail in New Orleans by said defendant as such publisher and proprietor of said newspaper, to be carried in and conveyed by said mail to said A. J. Bachemin, in Baton Rouge, in said State of Louisiana, where he resided, he then and there being a regular subscriber to said newspaper. Said advertisement in said newspaper contained in said indictment mentioned was an advertisement of the lottery of and conducted by the Louisiana State Lottery Company, a body corporate chartered and created by the act of the Legislature of Louisiana No. 25 of the session of 1868 and confirmed by the article 167 of the constitution of the State of Louisiana, adopted in 1879, which charter and constitution were, on the said 12 February, 1891, and still are in full force, which lottery so advertised was a lottery authorized by the law of said State, and which advertisement was lawfully printed and published in said newspaper in the ordinary course of business of receiving and publishing advertisements in said newspaper, and was so printed and published in the pursuit of the lawful business of the said proprietors and publishers of said newspaper in consideration of the payment of the usual

price for printing and publishing advertisements therein; and this the said George W. Dupre is ready to verify.

Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

(Signed) GEORGE W. DUPRE.

(Signed) THOS. J. SEMMES,
Of Counsel for Defendant.
(Signed) JOSEPH P. HORNOR & SON, *Att'ys.*

Endorsed: 1975. United States circuit court, E. D. Louisiana. United States *vs.* George W. Dupré. Plea. Filed Feb'y 21, 1891.

Demurrer to Defendant's Plea. Filed Feb'y 27, 1891.

UNITED STATES
vs.
GEO. W. DUPRÉ. } No. 1975.

And now Wm. Grant, attorney for the United States, who prosecutes in their behalf, as to the said plea of the said George W. Dupre by him above pleaded, saith that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said United States from prosecuting the said indictment against him, the said George W. Dupre, and that the said United States are not bound by the law of the land to answer the same; and this the said Wm. Grant, who prosecutes as aforesaid, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, he, the said Wm. Grant, attorney for the United States, prays judgment, and that the said George W. Dupre may be convicted of the premises of the said indictment specified.

(Signed) WM. GRANT,
United States Attorney.

Joinder to Demurrer to Plea. Filed Feb'y 27, 1891.

UNITED STATES
vs.
GEORGE W. DUPRE. } No. 1975.

And the said George W. Dupre says that his said plea by him above pleaded and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said United States from prosecuting the said indictment against him, the said George W. Dupre, and the said George W. Dupre is ready to verify and prove the same as the said court here shall direct and award; wherefore, inasmuch as the said William Grant, attorney for the United States, hath not answered the said plea nor hitherto in any manner denied the same, the said George W. Dupre prays judgment, and that by the court

here he may be dismissed and discharged from the said premises in the said indictment specified.

(Signed) GEORGE W. DUPRE.

(Signed) THOMAS J. SEMMES, *Of Counsel.*
(Signed) JOSEPH P. HORNOR & SON, *Att'ys.*

Order on Demurrer of United States to Plea of Defendant.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, FRIDAY, *February 27th*, 1891.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

UNITED STATES
vs.
GEO. W. DUPRÉ. } No. 1975.

This cause came on this day to be heard on the plea filed by the defendant to the indictment herein found and presented against him on the 18th day of February, A. D. 1891, and the demurrer filed by the United States to the said plea and the joinder of defendant therein, and was argued by Mr. Jos. P. Hornor for the accused and Mr. Wm. Grant, U. S. attorney, on behalf of the United States; whereupon and on consideration thereof it was ordered and adjudged, both judges concurring, that the demurrer of the United States to the said plea be sustained, the plea overruled, and the defendant ordered to plead to the indictment; and thereupon the surety of the defendant surrendered him to the custody of the United States marshal in open court, and the bond given by said defendant on Feb'y 13th, 1891, with H. O. Seixas as surety, in the sum of two hundred and fifty dollars, was cancelled, and, on motion of the U. S. attorney, it was ordered that a commitment issue for the detention of the accused until discharged according to law.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, New Orleans Division, } *ss:*

To the marshal of the eastern district of Louisiana or either of his deputies and the keeper of either of the gaols in said district, Greeting:

These are, in the name of the President of the United States of America, to command you, the said marshal or deputies, and each of you forthwith to convey and deliver into the custody of the keeper of either of our said gaols the body of George W. Dupre, who now stands indicted in our said court for having unlawfully and knowingly deposited in the post office in the city of New Orleans, to be conveyed by mail, a certain newspaper containing an advertisement concerning a lottery offering prizes dependent on lot or chance, in violation of section 3894 of the Revised Statutes of

the United States, in default of bail; and you, the said keeper, in the name of the President of the United States aforesaid, are hereby commanded to receive the said George W. Dupre into your custody in either of our gaols and him there safely to keep or be otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27 day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the United States Circuit Court,
Eastern District of Louisiana.

[Endorsed:] United States circuit court. No. 1975. The United States *vs.* George W. Dupre. Commitment.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 14 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of United States *vs.* George W. Dupre, No. 1975 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 27 day of February, A. D. 1891.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 27 day of February, A. D. 1891.

EDWARD C. BILLINGS, *Judge.*

Supreme Court of the United States. October Term, 1890.

Ex Parte: In the Matter of JOHN L. RAPIER, Petitioner.

Now comes petitioner, by his counsel, Hannis Taylor, and moves the court for leave to file a petition for writs of *habeas corpus* and certiorari, hereto annexed.

HANNIS TAYLOR,
Counsel for Petition-.

To the honorable the Supreme Court of the United States:

Your petitioner, John L. Rapier, who is a citizen of the United States and of the State of Alabama, residing in the city of Mobile, in said State, respectfully shows unto this honorable court that he has been for many years connected with the printing and publishing of the Mobile Daily and Weekly Register, a newspaper which has been published in said city of Mobile continuously for more than sixty years; said newspaper is now printed and published by the Register Company, a corporation existing under the laws of Alabama, whereof your petitioner is president and general manager. During the month of September, 1890, said newspaper was printed and published as usual, containing an advertisement of the Louisiana State Lottery Company, which for a long time had been running in the columns of said paper. An issue of said paper containing said advertisement was mailed in the post office of the United States at Mobile, during said month of November, and after the 19th day thereof, in the regular course of the business of said paper. On the 6th day of October, 1890, one Henry Booth, claiming to be a post-office inspector of the United States, appeared before W. D. McKinstry, a United States commissioner, at Mobile, and made affidavit charging petitioner with the violation of section 3894 of the Revised Statutes of the U. S. as amended on the 19th day of September, 1890. A copy of the proceedings which took place before said commissioner is contained in the transcript of the record of the district court of the United States for the southern district of Alabama, hereto annexed to this petition as a part thereof and marked "Exhibit A." Your petitioner further shows unto this honorable court that on the 24th day of November, 1890, the United States district attorney for said southern district of Alabama filed an information against your petitioner, a true copy of which appears in said transcrip-, in which he is charged with the alleged offense against the postal laws of the United States particularly set forth and described in said information. On the 9th day of September, 1890, said information was set down, as petitioner is informed, for trial in the district court, and on that day, as petitioner is informed, he not appearing, a *capias* was issued by order of said district court in the name of the Presi-

dent of the United States and directed to the marshall of said southern district of Alabama, commanding him to arrest your petitioner and to bring him before said district court. Your petitioner avers that on said 9th day of December, 1890, said marshall, acting under said order and said writ, did arrest your petitioner and now holds him in his custody under and by color of said process, as will more fully appear from the said writ and the return thereto made by said marshall, as set forth in said transcript, hereto annexed as a part of this petition and heretofore referred to. Since the arrest of your petitioner he has filed in said district court a motion to quash said information, upon the ground that the matters therein set forth constitute no crime, for the reason that the pretended act under which said information was drawn is unconstitutional and void. Said motion, together with a motion to discharge defendant, was overruled by said district court, as said transcript will show.

Your petitioner avers that he is now in the custody of said marshall under or by color of the authority of the United States and in violation of the Constitution of the United States. Your petitioner is advised that the pretended statute under which he is being prosecuted and held is in violation of the Constitution of the United States, and that the said district court is without jurisdiction in the premises.

Wherefore your petitioner prays, to the end that he may be relieved of the said unlawful detention and imprisonment to which he is now being subjected, that a writ of *habeas corpus*, to be directed to the said B. W. Walker, marshall of said southern district of Alabama, may be issued in his behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require. And your petitioner further prays that at the same time a writ of certiorari be issued to the said district court, commanding it to certify forthwith to this honorable court, under seal, a full, true, and complete transcript of said record and proceedings against your petitioner hereinbefore referred to.

JNO. L. RAPIER.

HANNIS TAYLOR,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of Alabama.

John L. Rapier, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true as he verily believes.

JNO. L. RAPIER.

Subscribed and sworn to before me this 6th day of February, A. D. 1891.

RICH'D JONES,
Clerk U. S. Dist. C't.

EXHIBIT A.

UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama.

THE UNITED STATES
vs.
JOHN L. RAPIER. } No. 506. Filed Nov. 24th, 1890.

Charge.

Criminal information under section 3894, Rv. St., as amended by act of Congress of Sept. 19th, 1890.

Transcript of the record.
Morris D. Wickersham, Esq., U. S. att'y, for plaintiff.
Hon. Hannis Taylor, att'y for defendant.

UNITED STATES OF AMERICA,
The Southern District of Alabama.

Affidavit.

UNITED STATES
vs.
JOHN L. RAPIER. } No. 506.

Be it remembered that on or about the 6th day of October, 1890, before me, W. D. McKinstry, a commissioner of the United States, personally appeared Henry Booth, post-office inspector, who, being duly sworn, says on oath that on or about the 24 day of September, 1890, John L. Rapier did deposit or knowingly cause to be deposited a certain newspaper in a post office established under the laws of the United States, to wit, in the post office at Mobile, Alabama; which said newspaper was known as and called the Daily Register and was intended to be carried by the United States mail for delivery, according to the directions thereon, at the post office in Montgomery, Alabama; which said newspaper contained an advertisement of a lottery, to wit, the Louisiana State Lottery Company; which said advertisement is as follows, to wit:

See page # 2.

UNPRECEDENTED ATTRACTION!

Over a Million Distributed.

L.A.S.L.

LOUISIANA STATE LOTTERY COMPANY,

Incorporated by the Legislature for educational and charitable purposes,

And its franchise made a part of the present State constitution, in 1879, by an overwhelming popular vote.

Its grand extraordinary drawings take place semi-annually (June and December),

And its grand single number drawings take place in each of the other ten months in the year, and are all drawn in public, at the Academy of Music, New Orleans, La.

"We do hereby certify that we supervise the arrangements for all the monthly and semi-annual drawings of the Louisiana State Lottery Co., and in person manage and control the drawings themselves, and that the same are conducted with honesty, fairness, and in good faith toward all parties, and we authorize the company to use this certificate, with fac-similes of our signatures attached, in its advertisements."

G. T. Beauregard

J. A. Early

Commissioners.

We, the undersigned banks and bankers, will pay all prizes drawn in the Louisiana State Lotteries which may be presented at our counters.

R. M. WALMSLEY,
Pres't La. Nat. Bank.
P. LANAUX,
Pres't State Nat. Bank.
A. BALDWIN,
Pres't N. O. Nat. Bank.
CARL KOHN,
Pres't Union Nat. Bank.

GRAND MONTHLY DRAWING

WILL TAKE PLACE AT THE

ACADEMY OF MUSIC,

NEW ORLEANS,

TUESDAY, OCTOBER 14, 1890.

CAPITAL PRIZE:

$300,000.

100,000 tickets, at twenty dollars; halves, $10; quarters, $5; tenths $2.00; twentieths, $1.00.

LISTS OF PRIZES.

1 prize of	$300,000 is	$300.000
1 prize of	100,000 is	100,000
1 prize of	50,000 is	50,000
1 prize of	25,000 is	25,000
2 prizes of	10,000 are	20,000
5 prizes of	5,000 are	25,000
25 prizes of	1,000 are	25,000
100 prizes of	500 are	50,000
200 prizes of	300 are	60,000
500 prizes of	200 are	100,000

APPROXIMATION PRIZES.

100 prizes of	$500 are	$50,000
100 prizes of	300 are	30,000
100 prizes of	200 are	20,000

TERMINAL PRIZES.

999 prizes of	100 are	99,900
999 prizes of	100 are	99,900
3,134 prizes, amounting to		$1,054,800

AGENTS WANTED EVERYWHERE.

☞ For club rates or any further information desired write legibly to the undersigned, clearly stating your residence, with State, county, street, and number. More rapid return mail delivery will be assured by your enclosing an envelope bearing your full address.

Important.

All ordinary letters containing postal notes, money orders issued by all express companies or New York exchange, addressed—

M. A. DAUPHIN,
New Orleans, La.

Address registered letters containing currency to—

NEW ORLEANS NATIONAL BANK,
New Orleans, La.

Or send your orders through—

THEODORE GUESNARD,
Mobile, Ala.

"Remember that the payment of prizes is guaranteed by four national banks of New Orleans, and the tickets are signed by the president of an institution whose chartered rights are recognized in the highest courts; therefore beware of all imitations or anonymous schemes."

Remember that the present charter of the La. State Lottery Co., which the Supreme Court of the U. S. has decided to be a contract with the State of Louisiana and part of the constitution of the State, does not expire until the first of January, 1895. The Legislature of Louisiana, which adjourned on the 10th of July of this year, has ordered an amendment to the constitution of the State, to be submitted to the people at an election in 1892, which will carry the charter of the Louisiana Lottery Company up to the year nineteen hundred and nineteen.

Which said newspaper containing said advertisement of said lottery was non-mailable matter under the provisions of section 3894 of the Revised Statutes of the United States as amended by an act of Congress entitled An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes, which said act was approved on the 19th day of September, 1890, and said newspaper containing said advertisement of said lottery was deposited or knowingly caused to be deposited in said post office at Mobile by said John L. Rapier, to be carried by mail for delivery according to the directions thereon, as aforesaid, through the said post office at Montgomery, Ala., in violation of said statute as so amended, contrary to the form of the statute in such cause made and provided and against the peace and dignity of the United States.

Deponent further says that Henry Booth and others to him unknown are able to testify of their own knowledge concerning the violation of law as aforesaid; wherefore he prays that a warrant of arrest may be issued against the said John L. Rapier, and writs of subpœna issued for the persons named as witnesses, returnable at such time and place as is in accordance with law.

HENRY BOOTH,
P. O. Inspector.

Sworn to and subscribed on this 6th October, 1890.

W. D. McKINSTRY,
U. S. Commissioner.

Endorsed: Filed October 6th, 1890. W. D. McKinstry, U. S. commissioner.

* * * * * * *

Bond.

UNITED STATES OF AMERICA,
Southern District of Alabama.

THE UNITED STATES
vs.
JOHN L. RAPIER, Defendant, Charged with Violation of Section 3894 of Revised Statutes of the United States.

Bond of defendant.

We, John L. Rapier, agree to pay the United States of America two hundred and fifty dollars unless the said John L. Rapier appears at the next term of either the circuit or district court of the United States of said district, and from term to term thereafter until discharged by law, to answer a criminal prosecution for the offense of violation of section 3894 of the Revised Statutes of the United States, viz., for violation of the ante-lottery act; and, so far as this bond is concerned, and in consideration thereof, we expressly waive our right to have exempted to us any of the property which the constitution and laws of the State of Alabama exempt now or may exempt hereafter to any resident of said State from sale on execution or other legal process of any court issued for the collection of any debt.

Signed, sealed, and acknowledged this 6th day of October, A. D. 1890.

(Signed) JNO. L. RAPIER. [SEAL.]

W. D. McKINSTRY,
Commissioner of the Circuit Court of said District.

Filed November 24th, 1890.

Information.

UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama, for the November Term, A. D. 1890.

To the honorable the judge of the district court of said district:

Morris D. Wickersham, district attorney for the United States for the said southern district of Alabama, who, for the said United

States in this behalf, prosecutes in his proper person, comes here into the said district court of the United States for the said southern district of Alabama, in this same term, and, by leave of the court first had and obtained, for the said United States gives the court here to understand and be informed—

That heretofore, to wit, 6th day of October, A. D. 1890, and before the filing of this information, John L. Rapier did deposit and knowingly cause to be deposited in a post office established under the laws of the United States, to wit, the post office at Mobile, in said southern district of Alabama, a certain newspaper published by him, the said John L. Rapier, in the city of Mobile, in the district aforesaid, known and called The Daily Register, and was intended to be carried by the United States mail for delivery, according to the directions thereon, at the post office in Montgomery, Alabama, which said newspaper contained an advertisement of and concerning a lottery offering prizes dependant upon lot or chance, to wit, the Louisiana State Lottery Company, which said advertisement is as follows:

LOTTERIES.

UNPRECEDENTED ATTRACTION!

Over a Million Distributed.

L.A.S.L.

LOUISIANA STATE LOTTERY COMPANY.

Incorporated by the Legislature for educational and charitable purposes.

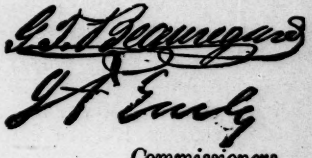
And its franchise made a part of the present State constitution in 1879 by an overwhelming popular vote.

Its grand extraordinary drawings take place semi-annually (June and December).

And its grand single-number drawings take place in each of the other ten months in the year, and are all drawn in public, at the Academy of Music, New Orleans, La.

"We do hereby certify that we supervise the arrangements for all the monthly and semi-annual drawings of the Louisiana State Lottery Co., and in person manage and control the drawings themselves, and that the same are conducted with honesty, fairness, and in good

faith toward all parties, and we authorize the company to use this certificate with fac-similes of our signatures attached, in its advertisements."



Commissioners.

We, the undresigned, banks and bankers, will pay all prizes drawn in the Louisiana State lotteries which may be presented at our counters.

R. M. WALMSLEY,
Pres't La. Nat. Bank.
P. LANAUX,
Pres't State Nat. Bank.
A. BALDWIN,
Pres't N. O. Nat. Bank.
CARL KOHN,
Pres't Union Nat. Bank.

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2 prizes of	10,000	are	20,000
5 prizes of	5,000	are	25,000
25 prizes of	1,000	are	25,000
100 prizes of	500	are	50,000
200 prizes of	300	are	60,000
500 prizes of	200	are	100,000

APPROXIMATION PRIZES.

100 prizes of $500 are	$50,000
100 prizes of 300 are	30,000
100 prizes of 200 are	20,000

TERMINAL PRIZES.

999 prizes of 100 are	99,900
999 prizes of 100 are	99,900
3,134 prizes, amounting to	$1,054,800

AGENTS WANTED EVERYWHERE.

☞For club rates or any further information desired write legibly to the undersigned, clearly stating your residence, with State, county, street, and number. More rapid return mail delivery will be assured by your enclosing an envelope bearing your full address.

Important.

All ordinary letters containing postal notes, money orders issued by all express companies or New York Exchange, addressed—

M. A. DAUPHIN,
New Orleans, La.

Address registered letters containing currency to—

NEW ORLEANS NATIONAL BANK,
New Orleans, La.

Or send your orders through—

THEODORE GUESNARD,
Mobile, Ala.

"Remember that the payment of prizes is guaranteed by four national banks of New Orleans and the tickets are signed by the president of an institution whose chartered rights are recognized in the highest courts; therefore beware of all imitations or anonymous schemes."

Remember that the present charter of the La. State Lottery Co., which the Supreme Court of the U. S. has decided to be a contract with the State of Louisiana and part of the constitution of the State, does not expire until the first of January, 1895. The Legislature of Louisiana which adjourned on the 10th of July of this year has ordered an amendment to the constitution of the State to be submitted to the people at an election in 1892 which will carry the charter of the Louisiana Lottery Company up to the year nineteen hundred and nineteen.

Which said lottery and advertisement concerning the same, hereinbefore set out, were a scheme devised and intended to deceive and

defraud the public for the purpose of obtaining money under false pretences, contrary to the form of the statute and the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Wherefore the said district attorney of the United States, for the said United States, prays the consideration of the court in the premises, and that due process of law may be moved against the said John L. Rapier in this behalf to make him answer the said United States concerning the premises aforesaid.

(Signed) M. D. WICKERSHAM,
United States Attorney.

Law: Sec. 3894 R. S. as amended by act of Congress of Sept. 19th, 1890.

Filed in open court, by leave of the court, this 24th of November, 1890.

RICH'D JONES, *Clerk.*

District Court of the United States for the Southern District of Alabama.

TUESDAY MORNING, *December 9th, A. D.* 1890.

Present: Hon. Harry T. Taulmin, judge, presiding.

UNITED STATES *vs.* JOHN L. RAPIER. } 506. Order: Judgm't *Nisi.* $250.00 Bond.

This day comes the United States, by its attorney, M. D. Wickersham, Esq., and it appearing to the court that the said defendant, John L. Rapier, did, on the 6th day of October, 1890, execute unto the United States his individual bond in the sum of two hundred and fifty dollars, conditioned that he, the said defendant, should make his appearance at the next term of either the circuit or district courts of the United States of said district and from term to term thereafter until discharged by law to answer a criminal prosecution for the offense of violation of section 3894 of the Revised Statutes of the United States, viz., for the violation of the ante-lottery act, etc. (see bond on file), and the said defendant, being this day called, comes not, but makes default, it is therefore considered that the United States have and recover of the said John L. Rapier on his bond aforesaid the sum of two hundred and fifty dollars unless he appears on or before the first day of the next term of the court and show cause why said judgment should not be made absolute.

UNITED STATES
vs.
JOHN L. RAPIER. } 506. Order for *Capias*, & Continued.

Upon motion of M. D. Wickersham, Esq., U. S. attorney, it is ordered that a *capias* do issue and that this cause be continued.

Capias.

The President of the United States of America to the marshal of the southern district of Alabama or any of his deputies:

Whereas an information has been filed by the attorney of the United States for the southern district of Alabama, which has been on the 24th day of December, A. D. 1890, returned into court and filed in the clerk's office, charging John L. Rapier with violation of the lottery law of the United States, and he having given bail for his appearance at this term of the court and failing so to do, thereby being in default:

Now, therefore, you are commanded, in the name of the President of the United States, to apprehend the said John L. Rapier and bring his body before the U. S. district court judge for the district aforesaid on or before the 1st Monday of May, A. D. 1890, that he may then and there be dealt with according to — for the said offense.

[SEAL.] Witness Hon. Harry T. Taulmin, judge of the district court of the United States for the southern district of Alabama, this ninth (9th) day of December, A. D. 1890.

RICH'D JONES, *Clerk.*

M. D. WICKERSHAM,
U. S. Dist. Att'y.

Return.

Received 9th day of December, A. D. 1890, and executed the 9th day of Dec., A. D. 1890, by arresting the body of Jno. L. Rapier and holding him in my custody.

B. W. WALKER,
U. S. Marshal,
By B. E. WALKER,
Deputy U. S. Marshal.

Marshal's cost, $2.00.

Endorsed: No. 506. District court of the United States for the southern district of Alabama. The United States *vs.* John L. Rapier. *Capias.* Issued 9th day of December, 1890. M. D. Wickersham, U. S. dist. att'y. Ret. ent'd, page 105, W. B., & filed December 15th, 1890. Rich'd Jones, clerk.

UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama.

UNITED STATES
vs.
JOHN L. RAPIER. } No. 506.

In this cause the defendant, being now in custody, comes and moves the court to set aside the continuance heretofore granted, and, that motion having been granted, he now files in said cause the following motion to quash the information heretofore filed against him in this cause by the hon. district attorney on the 24th November, 1890.

The said defendant now comes and moves the court to quash the said information heretofore filed against him in this cause on said 24th day of November, 1890—

First. Because the matters and things set up and charged in said information do not constitute any offense under any law of the United States or cognizable in any court of the United States.

Second. Because said pretended statute of the United States (section 3894, Rev. Stat., as amended by act of Congress of Sept. 19th, 1890) under which said information avers that it is drawn is null and void, being in violation of the Constitution of the United States.

And the said defendant prays judgment that said information be quashed, and that he may be dismissed and discharged by the court from the said premises in the said information specified.

(S'g'd) HANNIS TAYLOR,
Attorney for Def't.

Filed Feb. 3rd, 1891.

RICH'D JONES, *Clerk.*

District Court of the United States for the Southern District of Alabama.

TUESDAY MORNING, *Feb'y 3rd*, 1891.

UNITED STATES
vs.
JOHN L. RAPIER. } 506. Motion to Quash Information Denied.

This day comes the defendant, by his att'y, and also comes the United States, by its attorney, M. D. Wickersham, Esq., and the said defendant moves the court to quash the information in said cause, and, the court having duly considered the same, it is ordered and adjudged that said motion be, and the same is hereby, denied, and that said cause be continued until the next term of the court.

UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama.

I, Richard Jones, clerk of the United States district court for the district aforesaid, hereby certify that the foregoing is a full, true, and correct transcript of the record of the proceedings had in the case, to wit, "No. 506, The United States *vs.* John L. Rapier," as the same appears of record and on file in my office.

Witness my hand and the seal of said district court affixed this the 4th day of February, A. D. 1891.

Seal United States District Court, Southern Dis. of Alabama.

RICH'D JONES, *Clerk.*

[Endorsed:] Supreme Court of the U. S. *Ex parte:* In the matter of John L. Rapier. Petition for writs of *habeas corpus* and certiorari.

Supreme Court of the United States. October Term, 1890.

Ex Parte: In the Matter of GEORGE W. DUPRE, Petitioner.

Now comes petitioner, by his counsel, Thomas J. Semmes and Hannis Taylor, and moves the court for leave to file a petition for writs of *habeas corpus* and certiorari, as hereto annexed.

THOMAS J. SEMMES,
HANNIS TAYLOR.
Counsel for Petitioner.

To the honorable the Supreme Court of the United States:

The petition of George W. Dupre respectfully shows:

1st. That he is and was on and before the 17th day of February, 1891, a citizen of the United States and of the State of Louisiana, residing in the city of New Orleans, in said State.

2d. That on the 17th day of February, 1891, he wrote and addressed a letter to one A. J. Bachemin, and deposited the same in the post office and in the mail of the United States at New Orleans, La., to be conveyed by said mail to said Bachemin, at Baton Rouge, La., the postage thereon being prepaid, the same being inclosed in a post-paid envelope, the contents of said letter being of and concerning a certain lottery offering prizes dependant upon lot or chance, to wit, the lottery of the Louisiana State Lottery Company, and of and concerning a certain lottery ticket issued by said lottery company and of and concerning a certain drawing of a lottery by said company, which Louisiana State Lottery Company is and was then and there a body corporate created by the laws of Louisiana and thereby authorized to draw lotteries offering prizes dependant upon lot or chance.

3d. That afterwards, to wit, the 26th day of February, 1891, the grand jurors of the United States, impanneled and sworn in the circuit court of the United States in and for the eastern district of Louisiana, found and returned unto said court an indictment against your petitioner, alleging and charging therein that he did unlawfully and knowingly deposit in the post office of the United States and in the mail of the United States, at the city of New Orleans, in said district, to be sent in and carried by said mail to said Bachemin, the said letter so as aforesaid written and addressed to him, in violation of section 3894 of the Revised Statutes of the United States as amended September 19th, 1890; and thereupon, by direction and order of said circuit court, a *capias* was issued, by virtue and authority whereof your petitioner was arrested and taken into custody by the United States marshal for the eastern district of Louisiana; and afterwards, to wit, the 27th day of February, 1891, your petitioner was arraigned in said circuit court and required to plead to said indictment, and thereupon he interposed his demurrer thereto, alleging that the matters in said indictment contained, in manner and

form as therein stated and set forth, were not sufficient in law, and that by the law of the land he was not bound to answer the same, in which demurrer there was joinder by the United States attorney prosecuting in their behalf; and afterwards said demurrer came on to be heard by said court, and, upon consideration thereof, it was ordered, adjudged, and decreed by said court that said indictment and the matters therein contained are sufficient in law, and that he was bound to answer the same; all of which will more fully and at large appear by the transcript of the record of said indictment and of the proceedings and judgment thereon, which is hereto annexed and made a part hereof.

4th. And petitioner shows that upon the rendition of said judgment the surety upon his recognizance of bail surrendered him in open court, and thereupon he was by said court remanded to the custody of said marshal, where he now is, deprived of his liberty under and by color of the authority of the United States and of said court and in violation of the Constitution of the United States and of his rights as a citizen thereof, because he says that he is advised and therefore avers that the statute of the United States under which he is held and being prosecuted upon said indictment is unconstitutional, null, and void, and particularly obnoxious to and in violation of the first amendment to said Constitution, which forbids Congress passing any law abridging the freedom of speech, which includes the right of communication in writing between citizens of the United States upon the subject of and concerning all matters of lawful business, the said matters and things concerning which said letter was written being matters of lawful business in said State of Louisiana, and the carriage of letters otherwise than in and by the mail of the United States between places reached thereby being prohibited by law, and the United States mail being regularly carried from New Orleans to Baton Rouge aforesaid, he could not otherwise lawfully communicate in writing with said Bachemin at said last-named place. Wherefore said circuit court is and was without jurisdiction in the premises, and he is deprived of his liberty without authority of law.

And petitioner shows that by his demurrer to said indictment he invoked the decision of said circuit court in the premises and prayed thereby to be released from said unlawful deprivation of his liberty and further prosecution of said indictment, but said court, after a hearing thereof, refused and still refuses to grant him relief in the premises or restore him his liberty, of which he is thus unlawfully deprived, and he is without relief in the premises except in this honorable court.

Wherefore petitioner prays that the writ of *habeas corpus* may issue out of this court, directed to J. B. Donnally, United States marshal for the eastern district of Louisiana, commanding him, upon a day to be therein named, to bring before this court the body of your petitioner, together with the cause of his detention, to the end that your petitioner may be discharged from his custody.

And your petitioner further prays that at the same time a writ of certiorari be issued to said circuit court, commanding it to certify

forthwith to this honorable court, under the seal thereof, a full, true, and complete transcript of said record and proceedings against your petitioner herein before referred to, and for all general relief.

GEORGE W. DUPRE.

George W. Dupre, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read same and knows the contents thereof, and the statements therein made are true.

GEORGE W. DUPRE.

Sworn to and subscribed before me this 27th day of February, 1891.

{ Seal Robert P. Upton, Notary Public, Parish of Orleans, State of La. }

ROB'T P. UPTON, *Not. Pub.*

THOMAS J. SEMMES,
HANNIS TAYLOR,
Counsel for Petitioner.

UNITED STATES
v.
GEO. W. DUPRÉ. } No. 1977.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
GEORGE W. DUPRE. } No. 1977.

Index.

	Page.
Indictment	1
Demurrer	6
Joinder in demurrer	6
Judgment on demurrer	7
Commitment	9

UNITED STATES OF AMERICA,
Eastern District of Louisiana,

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, Holding Sessions at the City of New Orleans, Louisiana, of the November Term, A. D. 1890.

The grand jurors of the United States of America, duly empanelled and sworn in and for the eastern district of Louisiana, in the said circuit court, on their oath present that George W. Dupre, late of the eastern district of Louisiana, journalist, on the seventeenth day of February, A. D. eighteen hundred and ninety-one, at the city

of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court, unlawfully and knowingly did deposit in the post office of the United States, at the said city of New Orleans, then and there to be carried in and conveyed by the mail of the United States within the meaning and intent and in violation of section 3894 of the Revised Statutes of the United States, a certain letter concerning a lottery offering prizes dependent on lot and chance, to wit, concerning a lottery known as the Louisiana State Lottery, which said letter, when deposited as aforesaid, was known by the said George W. Dupre to be a letter concerning a lottery offering prizes dependent on lot and chance, and the same was enclosed in post-paid envelope directed to Mr. A. J. Bachemin, Baton Rouge, La., and is in words and figures as follows, to wit:

NEW ORLEANS, *Feb'y 17th*, 1891.

A. J. Bachemin, Esq., Baton Rouge, La.

DEAR SIR: In accordance with your request I have this day purchased for your account a lottery ticket issued by the Louisiana State Lottery Company for its drawing of March 17, 1891, the same being No. 18795, for which I paid the sum of twenty dollars, and which you can reimburse *and* by sending your check or paying it to me when you next come to this city. As soon as the drawing of said lottery is published I will send you a copy of the list of prizes and a circular containing the scheme for the drawing of April in the same lottery. I will retain the ticket in my possession, and if it draws a prize I will collect and remit the same to you without delay.

Truly yours, GEORGE W. DUPRE.

2. The jurors aforesaid, on their oath aforesaid, further present that the said George W. Dupre, on the seventeenth day of February, A. D. eighteen hundred and ninety-one, at the city of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court, unlawfully and knowingly did deposit and cause to be deposited in the post office and in the mail of the United States, at the said city of New Orleans, within the meaning and intent and in violation of the provisions of section 3894 of the Revised Statutes of the United States, to be then and there sent in and carried and conveyed by the said mail, a certain other letter concerning a lottery offering prizes dependent on lot and chance, to wit, a lottery known as the Louisiana State Lottery, which said letter, when so as aforesaid deposited in the said post office and mail, was enclosed in a post-paid envelope directed to Mr. A. J. Bachemin, Baton Rouge, La., all of which he, the said George W. Dupre, then and there well knew; and said letter is in words and figures as follows, to wit:

NEW ORLEANS, *Feb'y 17th*, 1891.

A. J. Bachemin, Esq., Baton Rouge, La.

DEAR SIR: In accordance with your request I have this day purchased for your account a lottery ticket issued by the Louisiana

State Lottery Company for its drawing of March 17th, 1891, the same being No. 18795, for which I paid the sum of twenty dollars, and which you can reimburse *and* by sending your check or paying it to me when you next come to this city. As soon as the drawing of said lottery is published I will send you a copy of the list of prizes and a circular containing the scheme for the drawing of April in the same lottery.

I will retain the ticket in my possession, and if it draws a prize I will collect and remit the same to you without delay.

Truly yours, GEORGE W. DUPRE.

—contrary to the form of the statute of the United States of America in such case made and provided and against their peace and dignity.

3. The jurors aforesaid, on their oath aforesaid, further present that the said George W. Dupre, on the seventeenth day of February, A. D. eighteen hundred and ninety-one, at the city of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court, unlawfully and knowingly did send and cause to be sent in and carried and conveyed by the mail of the United States, within the meaning and intent and in violation of section 3894 of the Revised Statutes of the United States, a certain other letter concerning a lottery offering prizes dependent on lot and chance, as he, the said George W. Dupre, then and there well knew, to wit, concerning a lottery known as the Louisiana State Lottery; which said letter, when so as aforesaid sent in and carried and conveyed in and by said mail, was then and there enclosed in a post-paid envelope directed to A. J. Backemin, Baton Rouge, La., and is in words and figures as follows, to wit:

NEW ORLEANS, *Feb'y 17th*, 1891.

A. J. Bachemin, Esq., Baton Rouge, La.

DEAR SIR: In accordance with your request I have this day purchased for your account a lottery ticket issued by the Louisiana State Lottery Company for its drawing of March 17th, 1891, the same being No. 18795, for which I paid the sum of twenty dollars, and which you can reimburse me by sending your check or paying it to me when you next come to this city.

As soon as the drawing of said lottery is published I will send you a copy of the list of prizes and a circular containing the scheme for the drawing of April in the same lottery. I will retain the ticket in my possession, and if it draws a prize I will collect and remit the same to you without delay.

Truly yours, GEORGE W. DUPRE.

—contrary to the form of the statute of the United States of America in such case made and provided and against their peace and dignity.

(Signed) J. W. GURLEY,
Ass't U. S. Att'y.

Endorsed: 1977. U. S. circuit court. United States *vs.* George W. Dupre. Indictment: Depositing letter concerning a lottery, to be conveyed by mail, &c., sec. 3894. A true bill. R. Viosca, foreman. New Orleans, 26 Feb'y, 1891. Filed Feb'y 26, 1891.

Demurrer. Filed Feb'y 27, 1891.

UNITED STATES
vs.
GEORGE W. DUPRE. } No. 1977.

And the said George W. Dupre, in his own proper person, cometh into court here and, having heard the said indictment read, says the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said George W. Dupre, is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of a sufficient indictment in this behalf, the said George W. Dupre prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

(Signed) GEORGE W. DUPRE.

(Signed) THOS. J. SEMMES, *Of Counsel.*
(Signed) JOSEPH P. HORNOR & SON, *Att'ys.*

Joinder in Demurrer. Filed Feb'y 27, 1891.

UNITED STATES
vs.
GEORGE W. DUPRÉ. } No. 1977.

And thereupon William Grant, attorney for the United States, who prosecutes in their behalf herein, saith that said indictment and the matters therein contained are sufficient in law to compel the said George W. Dupre to answer the same; and he, the said William Grant, is ready to verify and prove the same as the court shall direct and award. Wherefore, inasmuch as the said George W. Dupre has not answered to the said indictment, nor hath in any manner denied the same, the said William Grant, for the United States, prays judgment, and that the said George W. Dupre be convicted of the premises charged upon him in and by said indictment.

(Signed) WILLIAM GRANT,
U. S. Att'y.

Order on Demurrer of Defendant to Indictment.

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, FRIDAY, *February 27th*, 1891.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge; Hon. Edward C. Billings, district judge.

UNITED STATES
vs.
GEORGE W. DUPRE. } No. 1977.

This cause came on this day to be heard on the demurrer filed by the defendant to the indictment herein found and presented against him on the 26 day of February, 1891, and on the joinder of the United States in said demurrer, and was argued by Mr. Wm. Grant, United States attorney, on behalf of the United States, and Mr. Jos. P. Hornor, for the defendant, and submitted; on consideration whereof it was ordered and adjudged, both judges concurring, that the demurrer of the defendant be, and the same is hereby, overruled and the defendant ordered to plead to the said indictment.

Whereupon the surety of the defendant surrendered him to the custody of the United States marshal in open court, and the boud given by said defendant on Feb'y 17, 1891, with John Devonshire as surety, in the sum of two hundred and fifty dollars, was cancelled.

And thereupon, on motion of the United States attorney, it was ordered that a commitment issue for the detention of the accused until discharged according to law.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, } *ss:*

To the marshal of the eastern district of Louisiana or either of his deputies and the keeper of either of the gaols in said district, Greeting:

These are, in the name of the President of the United States of America, to command you, the said marshal or deputies, and each of you forthwith to convey and deliver into the custody of the keeper of either of our said gaols the body of George W. Dupre, who now stands indicted in our said court for having unlawfully and knowingly deposited in the post office, in the city of New Orleans, to be conveyed by mail, a certain letter concerning a lottery offering prizes dependent on lot and chance—in violation of section 3894 of the Revised Statutes of the United States—in default of bail.

And you, the said keeper, in the name of the President of the United States aforesaid, are hereby commanded to receive the said George W. Dupre into your custody in either of our gaols and him

there safely to keep, or be otherwise discharged in due course of law.

Hereof fail not at your peril.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27 day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the United States Circuit Court,
Eastern District of Louisiana.

[Endorsed:] United States circuit court. No. 1977. The United States *vs.* George W. Dupre. Commitment.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 9 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of United States *vs.* George W. Dupre, No. 1977 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 27 day of February, A. D. 1891.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 27 day of February, A. D. 1891.

EDWARD C. BILLINGS, *Judge.*

Office Supreme Court U. S.
FILED.
SEP 21 1891
JAMES. H. McKENNEY,
CLERK.

The Freedom of the Press.

"Congress shall make no law * * * abridging the freedom of speech or of the press."—*First Amendment, Const. U. S.*

IN THE

Supreme Court of the United States.

EX PARTE IN THE MATTER OF JOHN L. RAPIER,

PUBLISHER OF THE MOBILE DAILY AND WEEKLY REGISTER.

ARGUMENT OF HANNIS TAYLOR,

UPON A

PETITION FOR WRITS OF *HABEAS CORPUS* AND *CERTIORARI*, AGAINST THE CONSTITUTIONALITY OF THE RECENT ACT OF CONGRESS GENERALLY KNOWN AS THE

ANTI-LOTTERY LAW.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

EX PARTE: IN THE MATTER OF JOHN L. RAPIER, PETITIONER.

PETITION FOR WRITS OF *HABEAS CORPUS* AND *CERTIORARI.*

STATEMENT OF THE CASE.

The prayer of this petition is based upon the following state of facts: The petitioner, who is a citizen of the State of Alabama, residing in the city of Mobile, avers that he has been for many years connected with the printing and publishing of the Mobile Daily and Weekly Register, a newspaper which has been published in the city of Mobile continuously for more than sixty years. Such newspaper is now published by the Register Company, a corporation existing under the laws of Alabama, whereof petitioner is president and general manager. During the month of September, 1890, such newspaper was published as usual, containing an advertisement of the Louisiana State Lottery Company, which for some time before had been running in its columns. An issue of said paper containing such advertisement was mailed in the post office at Mobile during said month of September, and after the approval of "An act to amend certain sections of the Revised Statutes, and for other purposes," generally known as the anti-lottery law. On the 6th of October, 1890, a post-office inspector of the United States appeared before a commissioner at Mobile and made affidavit charging petitioner with the violation

of section 3894 of the Revised Statutes of the United States, as amended on the 19th day of September, 1890. On the 24th of November an information was duly filed in the district court of the United States for the southern district of Alabama, in which petitioner was formally charged with the alleged offense against the postal laws of the United States already referred to. On the 9th day of December the information was set down for hearing, and, petitioner not appearing, a *capias* was issued by order of the court, directed to the marshal, commanding him to arrest petitioner and bring him before the court. On the same day the marshal did arrest petitioner under such writ, and now holds him in his custody. While so held petitioner moved the court to quash the information and discharge him upon the ground that the matters charged do not constitute a crime by reason of the fact that the pretended statute under which the information is drawn is unconstitutional and void. That motion was refused and denied.

Petitioner avers that he is now in the custody of the said marshal under or by color of the authority of the United States; that he is advised that the pretended statute under which he is being prosecuted and held is void; and that the said district court is without jurisdiction in the premises.

It is the duty of this court upon this petition to forthwith award a writ of *habeas corpus* unless it appears from the petition itself that the party is not entitled thereto.—Rev. stat., Sec. 755. "Where the cause of the imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged."—Field's Federal Courts, sec. 390, citing *Ex parte* Milligan, 4 Wall., 2; *Ex parte* Milburn, 9 Pet., 704; *Ex parte* Watkins, 3 Pet., 192. The petitioner has stated his whole case upon the face of his petition, to which is annexed a transcript of the proceedings in the district court by virtue of which he is now held in custody. Whether he is entitled to the writ or no depends upon a single question—the constitutionality of section 3894, Rev. Stat., as amended September 19th, 1890.. If the section as amended is unconstitutional and void, there can be no question as to pe-

titioner's right to be discharged, for the reason that the court under whose order he is held is without jurisdiction.

It is now too well settled for controversy that while a writ of *habeas corpus* cannot be made to subserve the purpose of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal court, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court to act at all. In *Ex parte* Terry, 128 U. S., p. 304, the rule was thus lately defined: "While the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the sphere of the authority of the court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the subject-matter (*Ex parte* Lange, 18 Wall., 163; *Ex parte* Parks, 93 U. S., 18; *Ex parte* Siebold, 100 U. S., 371; *Ex parte* Rowland, 104 U. S., 604; *Ex parte* Curtis, 106 U. S., 371; *In re* Ayers, 123 U. S., 443, 455; *In re* Sawyer, 124 U. S., 200, 221; Harvey *vs.* Tyler, 2 Wall., 328, 345; *Ex parte* Fiske, 113 U. S., 713, 718"). There can be no question that the orders and proceedings of an inferior Federal court, based upon an unconstitutional act of Congress, are void for want of jurisdiction, and that in such a case this court will relieve the party restrained of his liberty by *habeas corpus* (*Ex parte* Siebold, 100 U. S., 371). In that case this court said: "An unconstitutional law is void and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." It would therefore be an unwarrantable hardship to force a party to pass through a trial and suffer the mockery of a conviction under such circumstances as a condition precedent to an application for the writ of *habeas corpus*. This court has expressly held that such a course is not necessary. (*Ex parte* Virginia, 100 U. S., 339; *Ex parte* Yerger, 85.) In the case first cited this court said that "when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal court," he is entitled to apply here for the writ. However, before filing this petition the defendant first invoked the judgment of the district court upon a motion to quash

the information under the rule lately indicated by this court, (*In re* Lancaster, 137 U. S., p. 395), which motion was refused.

SECTION 3894 OF THE REVISED STATUTES, AS AMENDED BY THE ACT APPROVED SEPTEMBER 19TH, 1890, reads as follows: "No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings of any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter-carrier; *nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.* Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offence. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

The petitioner claims that this congressional enactment, under which he is now being prosecuted and held, is in open violation of the first amendment to the Constitution of the United States, which provides that "Congress shall make no law respecting an

establishment of religion or prohibiting the free exercise thereof; *or abridging the freedom of speech or of the press;* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." During the century which has nearly passed by since the ratification of the first amendment, on the 15th of December, 1791, the vital clause which denies to Congress the right to abridge "the freedom of the press" has never before been brought before this Court for judicial interpretation. In *Ex parte* Jackson, 96 U. S., 727, the liberty of the press was not involved, and yet the court was careful in passing upon the question before it in that case to so guard its expressions as to preclude misconstruction as to the future prejudice of the right. Now for the first time in the history of the Republic has the publisher of an American newspaper sought the protection of this Court against what he claims is an unlawful attempt to abridge his rights upon the part of the American Congress. The gravity of the question cannot be exaggerated. The wonder is that it should ever have arisen at all. But since it has arisen, since the freedom of the American press has been assailed in a moment of excitement by a measure which has no precedent in American legislation, this Court should accept the question in its fullness and settle it for all time.

No acuteness of analysis need be employed to ascertain the intent and purpose of Congress, so far as the restraint is concerned which it has attempted to impose by the act in question upon the freedom of the press. The mandate is clear and positive: "Nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier." The violation of the act is made a crime which may be prosecuted either by information or indictment. The assumption upon which the act proceeds is that in the Congress of the United States there is vested a censorship, by virtue of which it may undertake to determine beforehand what a newspaper passing through the mails may or may not contain.

If Congress in its omnipotence shall assume to determine that any particular kind of matter is hurtful to the public interest or morals, the entire sheet in which such matter is contained shall be denied circulation through the mails, just as all literature was denied the right of circulation under the English and French censorial systems when the preliminary license was withheld by the functionary or council possessing the right to grant or withhold the *imprimatur*. The theory of the act is both clear and consistent, provided the censorship which Congress has assumed to exercise actually resides in that body.

From what part of the Constitution can it be claimed that the censorial power of Congress to regulate the *intellectual* contents of the mails is derived? In *Ex parte* Jackson, 96 U. S., 727, this Court said: "The power vested in Congress 'to establish post offices and post roads' has been practically construed since the foundation of the Government to authorize not merely the designation of the routes over which the mail shall be carried and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail and all matters necessary to secure its safe and speedy transit and the prompt delivery of its contents. * * * The power possessed by Congress embraces the regulation of the entire postal system of the country." It is, then, from article 1, section 8, of the Constitution, which provides that Congress shall have power "to establish post offices and post roads," that the censorial powers of Congress over the press are derived, if they exist at all. In Gibbons *vs.* Ogden, 9 Wheat., 197, this Court, speaking of the power of Congress to regulate commerce, said: "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Let it be conceded, then, that the power of Congress to regulate the mails is, like its power to regulate commerce, "plenary"—subject only to such "restrictions on the exercise of the power as are found in the Constitu-

tion of the United States." Such restrictions may be either expressed or implied. If the first amendment had never been adopted, it is plain that no express restriction in favor of the freedom of the press upon the power of Congress to regulate the mails would have existed. And yet it is certain that the framers of the Constitution understood that am implied restriction in favor of all fundamental rights was imposed upon Congress by the fact that it could exercise no powers except such as were specially delegated. Such was the argument of those members of the Federal Convention who opposed the adoption of a bill of rights. They claimed that it was not necessary to insert negative clauses in the Constitution for the protection of fundamental rights for the simple reason that Congress in the exercise of its expressly delegated powers could claim no implied authority to impair them. Hamilton argued in the Federalist (No. 84) that it would have been even dangerous to have inserted such negative clauses; for, said he, "Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that *the liberty of the press* shall not be restrained when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish to men disposed to usurp a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the National Government."

The First Ten Amendments Embody Constitutional Limitations upon Federal Power in Favor of Fundamental Rights.

Every student of the history of the Constitution knows that when it was submitted for ratification the people, unwilling to accept the argument that a bill of rights was unnecessary, offered in many of the State conventions bills of rights in the form of

proposed amendments. In that way a mass of amendments went up to the first Congress from the conventions of Massachusetts, South Carolina, New Hampshire, Virginia, New York, and North Carolina. (See Journals of the Old Congress, vol. XIII, appendix.) Out of the mass thus submitted the first Congress selected twelve, which were sent to the States for ratification. Out of the twelve, ten were ratified and became parts of the Constitution. The congressional prefix to these amendments declares that they were intended as limitations upon the Federal powers previously granted in the original Constitution, and this Court has always held them so to be. Barron *vs.* Baltimore, 7 Pet., 243; Fox *vs.* Ohio, 5 How., 410; Mechanics' & T. Bank *vs.* Thomas, 18 How., 384; Twitchell *vs.* Pennsylvania, 7 Wall., 321; Presser *vs.* Illinois, 116 U. S., 252. In these cases the doctrine has been stated by this Court, over and over again, that the prohibitions contained in the first ten amendments were intended, not as constitutional limitations upon the State governments in favor of their own citizens, but *as limitations upon the powers of the Federal Government* in favor of all citizens. There can, then, be no question that the original power vested in Congress "to establish post offices and post roads," and incidentally to regulate and control "the entire postal system of the country," was at a later day subjected to the express limitation contained in the first amendment, which provides that the Congress shall not so exercise the power originally granted as to abridge "the freedom of speech or of the press." If that were not so, the clause of the first amendment for the protection of the freedom of the press could find no field for its operation, for the reason that only through the administration of the postal system of the country can Congress exercise any control over the press whatsoever. It is, however, unnecessary to elaborate a point which this Court made so clear when, in *Ex parte* Jackson, it said, *arguendo:* "Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing. Indeed, without the circulation the publication would be of little value." When, therefore, article 1, section 8, is put in juxtaposition with that

part of the first amendment under consideration it will read as follows: Congress shall have power to establish post offices and post roads, and incidentally to regulate "the entire postal system of the country," provided that in the exercise of such regulation it shall make no law abridging the freedom of speech or of the press. In order to determine whether or no the act under consideration does in fact attempt to abridge the right in question, the Court must first ascertain what were the limits and boundaries of "freedom of the press" at the time of the adoption of the first amendment. All American constitutions in defining fundamental rights presuppose the existence of a system of immemorial law, common to the race on both sides of the Atlantic, in which such rights are explicitly defined in technical formulas known to lawyers as terms of art. The scope and meaning of these terms can only be ascertained by the aid of English history and jurisprudence. "The meaning of 'due process of law,' as used in the fifth amendment, and that of the 'law of the land, which is its equivalent in many of the State constitutions, must be sought in the story of the great charter and the grants by which it was supplemented." (Hare, Am. Const. Law, vol. 1, 531. See also Kring *vs.* Missouri, 107 U. S., 221, 229; Green *vs.* Shumway, 39 N. Y., 418, 421; *Ex parte* Wilson, 114 U. S., 417; Mackin *vs.* U. S. 117 U. S., 348; Kilbourne *vs.* Thompson, 103 U. S., 168, 181, 201; Munn *vs.* Illinois, 94 U. S., 113; Palairet's Appeal, 67 Pa., 479.) "It must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history, and when we find them expressed in technical words, words of art, we must suppose these words to be employed in their technical sense." (Cooley Const. Lim., 72.) "And thus it comes to pass that Magna Carta, the acts of the Long Parliament, the Declaration of Right, the Declaration of Independence, and the Constitution of 1787 constitute the record of an evolution." The practical difficulty in defining the words of art, "freedom of speech, or of the press,"

or, according to the more compact English formula, "the right to freedom of discussion," arises out of the fact that the term does not occur either in the ancient common law or in any of the English charters of liberties." The right to freedom of discussion, which Lord John Russell has called "the guardian and guide of all other liberties," was the last to be recognized by the state in England. It is of later growth even than the revolution of 1688. It is the result of parliamentary and judicial action since that time. Not until the century which intervened between the revolution of 1688 and the American revolution did the right to freedom of discussion become clearly defined in English and colonial law. Not until then did it become a part of "the law of the land." The leading purpose of this inquiry will be to ascertain the precise meaning of the term "freedom of speech or of the press" as defined in "the law of the land" prior to the adoption of the first amendment. In order firmly to grasp the full scope and meaning of this term as then understood we must trace, at least in outline, the history of the process through which the right to freedom of discussion—after breaking through the bars behind which it had so long been confined in turn by the church, the crown, and the Parliament in England—struck its roots into the soil of the New World, where it has bloomed into the dogmatic forms in which it now appears in our State and Federal Constitutions.

Rise and Fall of the Political Censorship in England.

With the advent of the art of printing the press was everywhere in Europe subjected to a rigorous censorship. "First, the church attempted to prescribe the bounds of human thought and knowledge, and, next, the state assumed the same presumptuous office. No writings were suffered to be published without the *imprimatur* of the licenser, and the printing of unlicensed works was visited with the severest punishments." (May. Const. Hist., vol. ii, 103.) The essence of the censorship was the right of the church or state to say beforehand what should be published—to prohibit the printing of all books and papers "but such as should be first seen and allowed." In England the censorship was as-

sumed and held by the church down to the Reformation, when the substantial part of it passed to the crown as a part of the royal prerogative, by virtue of the ecclesiastical supremacy which it then assumed. In addition to the restraints imposed by the censorship, the right to print was further limited by patents and monopolies, which confined the exercise of the art to certain persons and companies in Oxford, Cambridge, and London. During the reign of Elizabeth the general regulation of the rights of printing and publishing was actively assumed by the supreme censorial authority of the age, the Star Chamber; and when, in the reign of James I, the first newspaper made its appearance, the novel and obnoxious form of public discussion which it introduced was promptly silenced by its imperious mandate. When, upon the fall of the Star Chamber, in 1641, the censorship passed for a time from the crown to the Parliament, the restraints previously imposed upon the freedom of discussion suffered no relaxation. It was by an order of the Long Parliament, issued in 1643, that Milton's Areopagitica, a speech for the liberty of unlicensed printing, was called forth—itself an unlicensed book, in which the author cried out against the suppression of truth by the licenser as the slaying of "an immortality rather than a life." After the Restoration the entire control of printing and publishing was resumed by the crown and placed in the hands of its agents, under the licensing act of 1662 (13 and 14 Car., 11, c. 33), in which were substantially embodied the restrictive provisions contained in the Star Chamber order of 1637. Under the pressure of the supervision upheld by the authority of the licensing act all unofficial newspapers died out, leaving only the official London Gazette, which furnished scanty news without comment. This act, originally limited to two years, was renewed down to 1679, when it was permitted temporarily to expire; then it was that the twelve judges, with Chief Justice Scroggs at their head, declared it to be criminal at common law to "write on the subject of government; whether in terms of praise or censure, it is not material; for no man has a right to say anything of government (Carr's case, 1680; St. Tr., VII, 929), a monstrous opinion, sternly condemned by Camden, C. J., in 1755, in the case of Entick *vs.* Carrington, St. Tr., XIX, 1030. At the accession of

James II, in 1685, the licensing act was revived for seven years, and was thus in force during the Revolution and down to the year 1692, when it was once more renewed for one year, and until the end of the following session of Parliament. Although no mention was made of the freedom of the press in the bill of rights, the time had now come when the censorship in England was doomed to perish by the hand of a silent revolution. It perished simply because the Commons refused in 1695 to renew the licensing act by which it was upheld. In a document delivered by the Commons to the Lords at the time, their reasons for refusing to renew the act were carefully set forth. Macaulay (Hist. Eng., IV, pp. 541–2) tells us that "this paper completely vindicates the resolution to which the Commons had come; but it proves at the same time that they knew not what they were doing, what a revolution they were making, what a power they were calling into existence. They pointed out concisely, clearly, forcibly, and sometimes with a grand irony which is not unbecoming, the absurdities and iniquities of the statute which was about to expire; but all their objections will be found to relate to matters of detail. On the great question of principle, on the question whether the liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said. The licensing act is condemned, not as a thing essentially evil, but on account of the petty grievances, the exactions, the jobs, the commercial restrictions, the domiciliary visits, which were incidental to it. It is pronounced mischievous because it enables the company of stationers to extort money from publishers; because it empowers the agents of the government to search houses under the authority of general warrants; because it confines the foreign book trade to the port of London; because it detains valuable packages of books at the custom-house till the pages are mildewed. The Commons complained that the amount of the fee which the licenser may demand is not fixed. They complain that it is made penal in an officer of the customs to open a box of books from abroad, except in the presence of one of the censors of the press. How, it is very sensibly asked, is the officer to know that there are books in the box till he has opened it? Such were the arguments which did what Milton's Areopagitica had failed to do." The reasons which

the Commons gave for their action may have been practical and prosaic, and yet the end attained was none the less momentous. For, as the same author tells us, by their vote "English literature was emancipated, and emancipated forever, from the control of the government;" and he therefore justly concludes that "their action has done more for liberty and civilization than the Great Charter or the Bill of Rights."

The fact that the political censorship perished forever in England nearly a century before the American revolution; the fact that in 1695 the right to interfere with the freedom of discussion passed out forever from the legislative and executive departments of the English Constitution, is of supreme importance to the inquiry before us for the simple and conclusive reason that no attribute of political sovereignty can be claimed by any American State which at the time of the revolution was not vested either in the crown or in the Parliament. As this Court has said in Martin *et al. vs.* The Lessee of Waddell, 16 Peters, 410, 416: "When the revolution took place the people of each State became themselves sovereign," and as soon as they "took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament became immediately and rightfully vested in the State." The fundamental principle upon which our State system reposes is that every State legislature is endowed by its very nature with the general jurisdiction of the English Parliament, save so far as the same is limited by the express terms of constitutional limitations. Under this universally accepted theory it is impossible to maintain that even the plenary jurisdiction of a State legislature can embrace an attribute of sovereignty which the mother Parliament had abdicated a century before the English States in America entered upon an independent career. If this be true, then it is certain that not even a State legislature can claim to hold the rusty sword of the censorship in the armory of its plenary powers. How, then, can it be contended that such a weapon ever passed by implication to the Congress of the United States, a body armed with only expressly delegated powers, when the fact is remembered that the people, from whom its authority is derived, had a century before solemnly terminated its existence. If it be true, then, that the

Congress has never been endowed with the censorship, which passed away forever from the crown and the Parliament in 1695, then it is certain that the act in question is void for the good and sufficient reason that it attempts to deny the use of the mails to all newspapers and pamphlets which do not admit the power of Congress to determine beforehand what they shall contain. The right to determine beforehand what a publication should contain was the very essence of the censorship which prohibited the printing and circulation of all literature "but such as should be first seen and allowed."

The Political Censorship Succeeded by the Law of Libel.

But it will no doubt be contended by those who attempt to uphold this act that, while the extinct powers of the medieval censorship have not been revived either in the State legislatures or in the American Congress, the limitations which the act attempts to impose upon the press are legitimate revivals of those judicial restraints which the law of libel continued to impose upon the freedom of discussion in England after the censorial powers of the crown and the Parliament had passed forever away. The examination of the subject from this new point of view will lead us from parliamentary transactions to judicial proceedings—from St. Stephen's chapel to Westminster Hall. There is nothing in the constitutional or legal history of England better settled by the consensus of historians and text-writers than the fact that, after the fall of the censorship through the failure of the licensing act in 1695, the only restraints which remained upon the right to freedom of discussion were the judicial restraints imposed by the law of libel, which were enforceable only through the judgments of courts based upon the verdicts of juries. No better expositions of this principle can be found than those contained in the late work of Mr. Dicey, who, as the Vinerian professor of English law at Oxford, now so worthily fills the chair of Blackstone. This great jurist, in his recent work entitled "The Law of the Constitution," tells us that "the refusal of the English Parliament in 1695 to renew the licensing act did permanently establish the freedom of the press in England. The fifty years which followed were a period of revolutionary disquiet fairly comparable with the era of the

revolution in France. But the censorship once abolished in England was never revived, and all idea of restrictions on the liberty of press, *other than those contained in the law of libel*, have been so long unknown to Englishmen that the rare survivals in our law of the notion that literature ought to be controlled by the State appear to most persons inexplicable anomalies" (p. 247). "In England the doctrine has, since 1700, in substance, prevailed that the government has nothing to do with the guidance of opinion, and *that the sole duty of the State is to punish libels of all kinds*, whether they are expressed in writing or in print. Hence the government has (speaking generally) exercised no control over literature, and the law of the press, in so far as it can be said to have existed, has been nothing else than a branch or an application of *the law of libel*" (p. 238). "The liberty of the press, then, is in England simply one result of the universal predominance of the law of the land. The terms 'liberty of the press,' 'press offenses,' 'censorship of the press,' and the like are all unknown to English lawyers, simply because any offense which can be committed through the press is *some form of libel* and is governed in substance by the ordinary law of defamation" (p. 286).

It is worthy of note that this lucid writer always employs the more compact English formula, "the right to freedom of discussion," as the equivalent of the American formula, "the freedom of speech or of the press." The two rights as last expressed are identical from a legal point of view; for, as Mr. Dicey has expressed it, "Neither the government nor the courts have (speaking generally) any greater power to prevent or oversee the publication of a newspaper than the writing of a letter" (p. 234). "Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shop-keepers, think it expedient should be said or written" (p. 231). "Press offenses, in so far as the term can be used with reference to English law, are tried and punished only by the ordinary courts of the country—that is, by a judge and jury" (p. 235). Delolme, in his quaint treatise on the English Constitution (pp. 202, 203), tells us that "they do not allow, as in other States, that a man should be deemed guilty of a crime for merely publishing something in print, and they appoint a punishment

only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing *by twelve of his equals*, appointed to determine upon his case. It is even this latter circumstance which more particularly constitutes the freedom of the press."

What the English law of libel is and has been since 1695 has been thus expressed in general terms by another eminent writer upon the same subject: "Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual the person defamed may sue for damages; if, on the other hand, the words be written or printed, *or if treason or immorality be thereby inculcated*, the offender can be tried for the misdemeanor either by information or indictment." (Odgers, Libel and Slander, Introd. (1st ed.), p. 12.)

The Growth of the Law of Libel in England.

Although by the fall of the censorship the fact was finally settled that the press was free from all restraints at the hands of the state, except such as could be imposed, *under the law of libel*, through the judgments of courts and the verdicts of juries, a memorable battle had yet to be fought before the relative rights of judges and juries in the imposition of these restraints were fixed upon a permanent constitutional basis. Not until this last battle was won can it be claimed that the press in England achieved its full emancipation; not until the principle was settled that in all prosecutions for libel juries were the judges both of the law and the fact did that slow process in favor of liberty of opinion, which

"Broadens down from precedent to precedent,"

reach its full and final consummation. Nothing could have been more unfavorable to the right of freedom of discussion than the legal conditions which surrounded it at the time it was handed over by the Parliament to the tender mercies of the law of libel as then expounded and enforced. The despotic administration by the judges of this crude and undefined system of law during the reigns of William III and Anne made it appear for a time as if

the traditions of the Star Chamber were to become the rule of Westminster hall. From a political point of view the press was theoretically free; and yet from a judicial point of view it was still practically subject to a tyranny, but little less oppressive than the censorship itself. Every one was regarded as a libeler who assailed the dominant party; to censure the ministers was a personal reflection upon the king; while the vital question, whether a given publication constituted a libel or no, was a matter which the judges claimed could be passed upon by themselves alone. And yet it was during the reign of Anne that the press entered upon a new and vigorous career. Then it was that newspapers assumed their modern form and began to be published daily. The fresh advance thus made was encouraged during the reigns of the first two Georges by a more tolerant spirit which finds its typical illustration in Sir Robert Walpole, who openly expressed his indifference to and contempt for the political writers of all parties; while "other ministers, more easily provoked, found a readier vengeance in the gall of their own bitter scribes than in the tedious processes of the law." Such was the calm before the storm. With the accession of George III the English people, misrepresented in a corrupt House of Commons, undertook to control public affairs through the medium of public opinion, which was directed and moulded by three great agents—a fearless press, public meetings, and political concert and association. Upon the head of the press, as the great organ of public opinion, fell the wrath of the government, expressed in the famous series of prosecutions for criminal libel, which, beginning shortly before the American revolution, continued until after the adoption of the first ten amendments to the Constitution of the United States. Without a knowledge of the events which led up to these prosecutions, without a knowledge of their results, it is impossible to comprehend the intent and purpose of the first amendment, which found its place at the head of the list by reason of the fact that the leading subjects which it contained were at the time of its adoption burning questions upon the other side of the Atlantic. The statesmen who incorporated into this amendment the mandates that the Congress should neither interfere with the right of the people peaceably to assemble, nor abridge

the freedom of speech or of the press, were striving to protect the future citizens of the then infant Republic from such assaults upon the right to freedom of discussion as were at that time being made upon it in the streets of London and in Westminster hall.

Not long after the accession of George III the hostile forces of public opinion, guided by the press, broke in a storm of invective and obloquy upon the head of his first minister, Lord Bute, and drove him from power. Foremost among the journals which joined in the assault was the famous *North Briton*, conducted by Wilkes, who tore away the thin veil of concealment which had before been used in assailing public men and boldly attacked them by name. On the 23d of April, 1763, appeared the celebrated No. 45 of the *North Briton*, criticising in the severest terms both the King's speech at the prorogation and the unpopular Peace of Paris which had been concluded in the preceding February. Aroused by this assault, which the court considered an audacious libel, the law officers of the crown resolved to subject the offenders to the extremest penalties of the law. Not only was a criminal information filed against Wilkes himself in the King's Bench, but the prerogative was strained by the issue of a general warrant for the discovery and arrest of all writers and printers connected with the enterprise. Having secured their conviction, the government proceeded against other printers until the number of *ex officio* informations filed, as Walpole tells us in his Memoirs, reached the number of two hundred—a larger number than had been filed in the thirty-three years preceding that time. Dryden Leach, one of the printers of the *North Briton* arrested on suspicion under the general warrant, contested its validity, and Lord Mansfield, with the three other judges of the King's Bench, held it to be illegal. "No degree of antiquity," said his lordship, "could give sanction to an usage bad in itself" (Leach *vs.* Money, 19 St. Tr., 1001). In the same year (1765), in an action brought by the editor of the *Monitor* against the messengers who had seized his books and papers under a general warrant from the secretary of state, Lord Camden, chief justice of the common pleas, held that such warrants, which had their origin in the practice of the Star Chamber, were, since the expiration of the licensing act, absolutely illegal (Entick *vs.* Carrington,

19 St. Tr., 1030). In startling contrast to these judgments stands the doctrine laid down by Lord Mansfield in the trial of the printers of the *North Briton*, that it was the province of the court alone to judge of the criminality of a libel—a doctrine rendered more dangerous by the fact that it had been previously announced by Lord Raymond in 1731, in Franklin's case (St. Tr., XVII, 1243), and by Chief Justice Lee in 1752, in Owen's case (St. Tr., XVIII, 1203). Five years later the same doctrine was announced by the judge first named, with still greater emphasis, in two memorable cases of criminal libel which grew out of the publication in the *Morning Advertiser* of the 19th of December, 1769, of Junius' celebrated letter to the king. In the case of Rex *vs.* Almon, the bookseller who was tried for selling a publication containing a reprint of the letter, his lordship told the jury that it was the province of the judge alone to determine the criminality of the libel, while the jury should consider the fact of publication and whether the libel meant what it was charged to mean in the information (St. Tr., XX, 803). Again, on the trial of Woodfall (June 13, 1770), the original publisher of the "Letter to the King," his lordship told the jury that "as for the intention, the malice, the sedition, or any other harder words which might be given in informations for libel, public or private, they were mere formal words, mere words of course, mere inferences of law, with which the jury were not to concern themselves" (St. Tr., XX, 895). In Miller's case, tried in the following July, the same doctrine was so expressed as to let the jury understand that the defendant was in fact to be tried by the judge alone (St. Tr., XX, 870). The doctrine was now settled, so far as it was within the power of the judges at Westminster to settle it, that the author of whatever might be considered a criminal libel might be prosecuted by an officer of the crown without investigation by a grand jury, and that upon the trial of the information the defendant could be in substance denied the right of a trial by his peers. In all cases of criminal libel "the only material issue for the jury to try was whether the paper was libelous or not, and this was emphatically declared to be entirely beyond their jurisdiction. Trial by jury was the sole security for the freedom of the press, and it was found

to have no place in the law of England" (May. Const. Hist., vol. ii, 114.) Such a monstrous doctrine, so at variance with the immemorial rights of juries, excited such a general alarm and so shocked the constitutional sense of the English people that there was no pause until it was overthrown.

Rights of Juries in Prosecutions for Criminal Libel Finally Established.

The three controlling causes which finally brought about the right result were the terrible letter of Junius (No. 41, Nov. 14th, 1779) to Lord Mansfield himself; the denunciations in Parliament of Mansfield's doctrine, which were emphasized by the assaults of Chatham, Burke, and Camden, and, last and most of all, the two historic speeches of one of the most brilliant forensic orators of ancient or modern times. When Dr. Shipley, dean of St. Asaph, recommended a harmless little tract written by Sir William Jones and entitled "A dialogue between a farmer and a gentleman"—a plea for parliamentary reform—to a society of reformers in Wales, he paved the way for Erskine to finally emancipate the English press by establishing the right of juries in cases of criminal libel not only to pass upon the fact of publication, *but upon the criminality of the libel itself.* In arguing for a new trial in this case in 1784, Erskine delivered before the judges, with Mansfield at their head, what Fox declared to be "the finest argument in the English language." He claimed "that the defendant had had in fact no trial, having been found guilty without any investigation of his guilt, and without any power left to the jury to take cognizance of his innocence." This great argument fell, however, upon deaf ears, so far as the judges were concerned to whom it was addressed. As Erskine said afterwards in his defense of Paine, the chief justice, "Put me aside with indulgence, as you do a child when it is lisping its prattle out of season." But the appeal thus made for the freedom of the press sank so deep into the minds of the English people that, when a few years later the same orator repeated it with still greater brilliance in the case of Stockdale, the judgment of the nation was pronounced in its favor in the high court of Parliament itself.

Erskine argued the case of Stockdale in 1789, and in May, 1791 (a little more than six months before the ratification of the first amendment, in the following December) Mr. Fox introduced in the Commons his famous libel act, entitled "An act to remove doubts respecting the functions of juries in cases of libel," a *declaratory* statute, in which the highest court in the realm practically reversed the judgment of the judges by ascertaining that the law of England had ever been and ever should be as Erskine had so long and so persistently contended. Thus through a second peaceful revolution, inaugurated by the Commons, the judicial tyranny which had succeeded the political censorship of the press was made to share its fate.

Summary.

The brief review which has now been made of the persistent growth of the right to freedom of discussion in England, during the period which intervened between the end of the Middle Ages and the adoption of the first ten amendments to the Constitution of the United States, will enable us to establish beyond all cavil or question the following conclusions:

First. The censorship to which the press was first subjected by the state in England was a system of political control resting upon the authority of the crown and the Parliament, exercised sometimes singly, sometimes jointly, through administrative functionaries who undertook to determine before publication whether a book or paper should circulate or not. The essence of the system was rather preventive than corrective—the right to print and publish depending upon the power of the writer to obtain the *imprimatur*, which was the sign and token that the matter in question had been "first seen and allowed." From the reign of Mary down to the fall of the Star Chamber, in 1641, the administration of this system was directed by that body; and after its fall it was continued by the joint authority of the crown and the Parliament down to its abolition, in 1695, through the refusal in that year of the Commons to renew the licensing act, upon which its perpetuation depended. With the expansion of thought and with the advance of civilization this barbaric system having be-

come obsolete, the English people—a century before the American revolution—left it to perish amid the smouldering embers of the dying medievalism. Bitter indeed must have been the gall of the satirist who, in drafting the act in question, attempted to revive this archaic system by imposing upon the press of a country, which now poses in the garb of Liberty enlightening the world, a restraint which denies to the American newspaper the right to circulate along the official highway of intercommunication until an administrative functionary, under the authority of the political department of the Government, has granted it the *imprimatur*, after its contents has been "first seen and allowed." It is a matter of public history that since the passage of the act in question editions of more than one American newspaper have been refused admission to the mails at the post office by administrative functionaries, and have been returned to the publishers, after their contents had been first seen and *dis*allowed.

Second. After the fall of the censorship, through the failure of the licensing act in 1695, the political or state control to which the press had been subject gave way to a system of judicial control, embodied in what English lawyers call the law of libel. Speaking of the system of press law which has existed in England since the fall of the censorship, Mr. Dicey says: "The law of the press as it exists here is merely part of the law of libel, and it is well worth while to trace out with some care the restrictions imposed by the law of libel on the 'freedom of the press;' by which expression I mean a person's right to make any statement he likes in books or newspapers" (The Law of the Constitution, pp. 225, 226). For a century after its inauguration the new system of judicial control, imposed upon the press through the vigorous enforcement of the law of libel, proved in practice but little less oppressive than the censorship itself. The real cause of this oppression arose out of the enforcement of the rule of law which for a long time prevailed in Westminster hall, to the effect that in the trial of criminal libels the gravamen of the offense was to be tried not by the jury, but by the judge. With the overthrow of this monstrous doctrine by the enactment of Mr. Fox's libel act, which was introduced just before the adoption of the first amend-

ment, the complete emancipation of the press in England from judicial tyranny was fully and finally established. When that point was reached, when it was finally settled that every English subject could publish in a book or newspaper anything he liked, subject only to the consequences which might follow from a prosecution under the law of libel—*a law under which the jury were entitled to pass upon the criminality of the whole subject-matter*—no doubt could longer exist that "freedom of discussion is, then, in England little less than the right to write or say anything which a jury, consisting of twelve shop-keepers, think it expedient should be said or written." (The Law of the Constitution, p. 231.)

Technical Aspects of the English Law of Libel.

In order fully to grasp the nature and extent of the restraints imposed upon the English press by the law of libel, it is necessary to understand something of the technical character of that law, which appears in both a civil and criminal aspect. If any one unjustly attacks an individual, the person defamed is entitled to sue for damages. "If, on the other hand, the words be written or printed, or if treason or *immorality* be thereby inculcated, the offender can be tried for the misdemeanor either by information or indictment" (Odgers, Libel & Slander, Introd., 1st ed., p. 12). All publications were criminal libels at common law which tended to weaken or dissolve the Christian religion, *public morality*, or the government of the state, as represented by the king, the Parliament, or the magistracy. "The offense (of libel) may consist of the tendency of the communication to weaken or dissolve religious or moral restraints or to alienate men's minds from the established constitution of the State" (Starkie, Slander, p. 130). And the same author tells further on that although there was once some doubt on the subject, "It is now fully established that any immodest or immoral publication tending to corrupt the mind and to destroy the love of decency, morality, and good order is punishable in the temporal courts" of England (p. 150). But it is to Blackstone (B'k IV, p. 152) that we must go for the clearest statement of the relation between the law of criminal libel and the freedom of the press, which he has sum-

marized as follows: "In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the law of England, some with a greater, others with a less, degree of severity, the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in the freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal he must take the consequences of his temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings which, when published, shall *on a fair and impartial trial be adjudged of a pernicious tendency* is necessary for the preservation of peace and good order of government and religion—the only solid foundations of civil liberty." In every prosecution for criminal libel it was necessary to charge and prove against the defendant a criminal intention (Russell on Crimes, vol. II, 243). If, then, during the period immediately preceding the adoption of the first amendment, the publisher of an English newspaper had seen fit to put forth any matter tending to corrupt public morals, there was no *preventive* power in the entire system of English law which could have stayed his hand and arrested the execution of his intention. No general search warrant could have been issued by the Secretary of State, under which his press and materials could have been seized and destroyed, because that Star-Chamber process had perished by the hands of the judges. No official in the English post office would have dared to deny a newspaper the right to circulate through the mails after inspection of its contents, because he would have understood that he was the servant of a "government of law as contradistinguished to a government of functionaries." Not until

after the publication could the law officers of the crown have brought the offender to the bar upon an accusation of criminal libel, and then not until after an impartial trial and conviction by a jury of his peers, *armed absolutely and exclusively with the power to determine whether the publication was moral or immoral and whether his intent in its publication was criminal or innocent*, could any penalty have been imposed upon him. So averse did the English people finally become to subjecting, as Blackstone expressed it, "all freedom of sentiment to the prejudices of one man," or any permanent body of men, that they withdrew this supreme censorial power first from the crown, then from the Parliament, then from the judges, and finally vested it in special representative bodies drawn whenever occasion required them, like water from a well, fresh from themselves. *When the principle was finally settled that* THE MORALITY OR IMMORALITY *of the contents of a book, a letter, or a newspaper circulated in England could only be considered and inquired into, so far as government and law were concerned, by an English jury fresh from the ranks of the people and imbued with their sentiments, the keystone was put into the arch upon which the whole fabric of Anglican freedom of opinion has been superimposed.* Take out that keystone and the whole fabric will fall. In the light of that fact it is possible to understand what Lord Brougham meant when he said that the primary object of the English constitutional system, taken as a whole, was to put twelve honest men in the jury-box.

At the Common Law Lotteries Were Neither Mala Prohibita Nor Mala in Se.

As it will be hereafter demonstrated that the first amendment denies to Congress the right to impose upon the American press any new restraints in addition to those which, at the time of its adoption, were imposed upon the English press by the law of criminal libel, it is necessary to inquire at this point into the legal status of lotteries in England at the close of the last century. Let us suppose, for the sake of illustration, that in 1791 the *London Times* had published the identical lottery advertisement for the publication of which the petitioner has been arrested

in this case. We will then suppose that the Attorney General forthwith filed an information in the King's Bench against the publisher of the *Times*, charging him with the publication of such advertisement, and, in the technical language of that day, with "contriving, devising, and intending the morals as well of the youth as of other good citizens of said kingdom to debauch and corrupt." To such an accusation the counsel for the *Times* would certainly have demurred upon the ground that the facts charged could not by any possibility constitute an offense against public morals, for the good and sufficient reason that the carrying on of a lottery was not only *no offense at common law*, but was a perfectly legitimate enterprise, expressly sanctioned by the State. The legal investigation which such a demurrer would have brought about would have disclosed the fact that the "term 'lottery' has no illegal significance. Lotteries do not seem to be forbidden at common law. The term, therefore, has no illegal significance" (Clark's Manual of Crim. Law, sec. 1819). "The word 'lottery' is not a term of the law, and to dispose of real or personal estate by lottery is not an offense which has a recognized and established definition." (*Ibid.*, sec. 1824, citing Clark's case, 33 N. H., 334.)

In addition to this, the act of 19 Geo. III, c. 21, would have been produced, licensing and regulating the keeping of State lotteries as a useful means of increasing the public revenue. Lotteries authorized by the state were not abolished in England until by the statute of 6 Geo. IV. (See Sharswood's Blackstone, b'k IV, 167, Chitty's note.) From the year 1778 to the year 1825 lotteries authorized by the state were in England, in legal contemplation, not only legitimate but useful institutions. We have therefore arrived safely at two definite conclusions:

First. If the publisher of an English newspaper, at the time of the adoption of the first amendment, had been accused, in an information or indictment, with the commission of an offense against public morals by the advertisement of a licensed lottery, he could have disposed of such an accusation upon the legal ground that the facts charged could not possibly constitute an offense of any kind under the law of the land as it then stood.

Second. If this legal objection had been overruled and the de-

fendant put upon his trial, the fact whether the subject-matter of the publication was libelous or not—*that is, whether a lottery advertisement was a moral or immoral publication*—could have been considered and passed upon by a jury alone. We must next inquire whether, at the time in question, the law which regulated the freedom of the press in the United States was identical with the law of England.

The Right to Freedom of Discussion in the Colonies.

In the English colonies in America the right to freedom of discussion—that is to say, the right to "freedom of speech or of the press"—passed through substantially the same process of evolution which marked its growth in the mother country, with the important exception that in the virgin soil of the New World the growth of the plant was more vigorous and rapid. "The American colonies followed the practice of the parent country. Even the laws were not at first published for general circulation, and it seemed to be thought desirable by the magistrates to keep people in ignorance of the precise boundary between that which was lawful and that which was prohibited, as more likely to make them avoid all doubtful actions. The magistrates of Massachusetts, when compelled by public opinion to suffer the publication of general laws in 1649, permitted it under protest as a hazardous experiment. For publishing the laws of one session in Virginia, in 1682, the printer was arrested and put under bonds until the king's pleasure could be known, and the king's pleasure was declared that no printing should be allowed in the colony. There were not wanting instances of the public burning of books, as offenders against good order. Such was the fate of Elliot's book in defense of unmixed principles of popular freedom, and Calef's book against Cotton Mather, which was given to the flames at Cambridge. A single printing press was introduced into the colony so early as 1639; but the publication even of state documents did not become free until 1719, when, after a quarrel between Governor Shute and the House, he directed that body not to print one of their remonstrances, and on their disobeying he sought in vain to procure

the punishment of their printer. When Dongan was sent out as governor of New York in 1683 he was expressly instructed to suffer no printing, and that colony obtained its first press in 1692, through a Philadelphia printer being driven thence for publishing an address from a Quaker, in which he accused his brethren in office of being inconsistent with their principles in exercising public authority. So late as 1671 Governor Berkley, of Virginia, expressed his thankfulness that neither free schools nor printing were introduced into the colony, and his trust that these breeders of disobedience, heresy, and sects would long be unknown" (Cooley's Const. Lim., 517–18, 5th ed.). The general court of Massachusetts "appointed two persons, in October, 1662, licensers of the press, and prohibited the publishing of any books or papers which should not be supervised by them, and in 1668 the supervisors having allowed the printing of 'Thomas á Kempis de Imitatione Christi,' the court interposed, 'It being wrote by a Popish minister and containing some things less safe to be infused among the people,' and therefore they commended to the licensers a more full revisal and ordered the press to stop in the meantime." Hutchinson's Mass., 1, 257, 2d ed.; see also Hildreth, Hist. of the U. S., 1, 561; Bancroft, II, 73; Tyler, Hist. of Am. Literature, 1, 89, 112, 113. With the aid of these authorities it will be easy to trace the history of the censorship in the colonies down to the fall of the entire censorial system in the mother country through the failure of the licensing act in 1695. Sufficient emphasis has already been given to the fact that, after the fall of that system of political control, the only restraint which remained upon the press in England was the judicial restraint imposed by the law of libel, which was for a long time so rigorously enforced as to be but little less oppressive than the censorship itself—the cause of the oppression growing out of the rule of Westminster Hall which practically vested in all trials for criminal libel the determination of the real controversy not in the jury, but in the judge. The history of the struggle has already been given in some detail through which this monstrous rule of law was finally overthrown by the enactment of Mr. Fox's libel act, which, having been introduced in 1791, became law in 1792. With the fall of the censorship in the mother country the new doctrine that the right to

freedom of discussion was untrammeled, save so far as it was restrained by the limitations imposed by the law of libel, passed to the colonies as a part of the common law, and with it came the rule of Westminster Hall as to the despotic authority of the judges in all criminal trials involving the enforcement of that law. The important fact here to be noted is that in completing the emancipation of the press by the reversal of that rule which deprived juries in prosecutions for criminal libel of their proper functions

The Colonies Outstripped the Mother Country by Nearly Sixty Years.

From the colonial history of New York we learn that in November, 1733, appeared the first number of *Zenger's New York Weekly Journal*, in which from the beginning Lewis Morris, who had been removed from the chief justiceship by Governor Crosby, devoted himself to merciless attacks upon the Governor's administration. For these publications Zenger was indicted for criminal libel, and after a jury trial, which began on the 4th of August, 1733, before De Lancy, who had succeeded Morris in the chief justiceship, he was acquitted, although admitting the fact of the publication. The bold defense made by Andrew Hamilton of the right of juries to render general verdicts in such cases preceded the great efforts of Erskine by nearly fifty years. A clear account of this famous trial is thus given in a recent historical work of the very highest authority: "Zenger's trial began on the 4th day of August, and resulted in a verdict of 'not guilty.' The publishing of the alleged libel had been admitted, but it was claimed to be neither false, nor scandalous, nor malicious. When the New York lawyers, who had been engaged in the defense, were disbarred, Andrew Hamilton, a prominent pleader from Philadelphia, took the case. He managed it so adroitly, met the brow-beating of De Lancy so courageously, and pleaded the cause of his client so eloquently that he at once achieved a more conspicuous fame than belonged to any other practitioner at the bar of that day. The corporation of New York fell in with the popular applause in conferring upon him

the freedom of the city, enclosing their seal in a box of gold, while they added the 'assurances of the great esteem that the corporation had for his person and merits.' *The result of Zenger's trial established the freedom of the press in the colonies*, for it settled here the right of juries to find a general verdict in libel cases, as was done in England by a law of Parliament passed many years later, and it took out of the hands of judges appointed to serve during the king's pleasure, and not during good behavior, as in England, the power to do mischief" (Narrative and Critical History of America (edited by Justin Winsor), vol. V, pp. 199, 200, citing Bancroft, final revision, vol. II, 254). No matter, then, about the fact that the libel act, introduced in May, 1791, did not become a law until 1792. That act declared that the law of England had always been as its provisions declared it ever should be. Whether that declaration was true or false, certain it is that the principles which it defined had been the settled law of the colonies during the fifty-eight years which preceded its enactment. During that time the doctrine that in all trials for criminal libel the jury had a right to render a general verdict, after passing upon the law and the facts, sank deep into the soil. There was nothing of which the colonists were so tenacious as of their rights under the English common law, and especially of their right under that law to be tried in all cases by juries of the vicinage. In the first national assembly in which all the colonies met together, the Continental Congress of 1774, the representatives were careful to define the colonial privileges which they most cherished in a declaration of rights, in which they set forth "that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." How carefully that right was preserved in connection with freedom of speech and of the press we will ascertain as we next examine the dogmatic forms into which the right to freedom of discussion crystallized in the State constitutions.

The Right to Freedom of Discussion in the State Constitutions.

The statement has heretofore been made that as this right matured in England after the charter period had ended, it was not embraced in any of the great English documents, not even in the Bill of Rights. The first time that the right to freedom of discussion was ever defined in written constitutions was when, under the recommendation of the Continental Congress, made in May, 1776, the new States established independent governments under constitutions in which were restated in dogmatic forms all of the seminal principles of the English constitutional system. In the constitutions of the following States, which were adopted during the year 1776, the earliest definitions of freedom of speech and of the press occur: "That the liberty of the press ought to be inviolably preserved" (Const. of Maryland). "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments" (Const. of Virginia). "That the people have a right to freedom of speech and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained" (Const. of Pennsylvania). In the constitutions of the following States, adopted in the interval which preceded the adoption of the first amendment, these definitions occur: "That the public have the right to freedom of speech and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained" (Const. of Vermont, 1777). "Freedom of the press and trial by jury to remain inviolable forever" (Const. of Georgia, 1777). "That the liberty of the press be inviolably preserved" (Const. of South Carolina, 1778). "The liberty of the press is essential to the security of freedom in a state, and ought not, therefore, to be restrained in this Commonwealth" (Const. of Massachusetts, 1780). "The liberty of the press is essential to the security of freedom in a state. It ought, therefore, to be inviolably preserved" (Const. of New Hampshire, 1784). "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity, and any citizen may print on any

subject, being responsible for the abuse of that liberty. In prosecutions for publications investigating the proceedings of officers or where the matter published is proper for public information the truth thereof may be given in evidence, *and in all indictments for libel the jury may determine the facts and the law as in other cases*" (Const. of Delaware, 1792). Such were the safeguards of the right to freedom of discussion incorporated into the State constitutions prior to and immediately after the adoption of the first amendment. In the Federal convention of 1787 the subject was not forgotten. It was there proposed that a clause be inserted in the national Constitution that "the liberty of the press shall be inviolably preserved," which was negatived by a vote of six States against five (Journal of Convention, p. 217) upon the theory, no doubt, heretofore referred to, that such a provision should only occur in a bill of rights, and that in a constitution creating a government of expressly delegated powers a bill of rights was unnecessary. But when that view of the matter was rejected, when many of the States insisted that the powers of the Federal Government should be expressly restrained in that way, in favor of fundamental rights, Massachusetts, New Hampshire, South Carolina, New York, and North Carolina sent up to the First Congress the mass of material out of which were framed the first ten amendments finally adopted. All, or nearly all, of the States proposing amendments submitted some provision as a limitation upon the power of Congress to abridge freedom of discussion; but the first amendment, in the form in which it now appears, was the gift of Massachusetts. It is a verbatim copy of the third of the fourteen articles submitted by her as proposed amendments. (See Elliot's Debates, vol. 1, p. 183.) All, or nearly all, of the States which have adopted constitutions since the date of the first amendment have incorporated into them some provision for the protection of freedom of speech and of the press. When all of the adjudged cases in which these various provisions have been construed are collated, when all of the commentaries upon our American constitutions are examined, it will be found that there is

A Perfect and Unbroken Consensus of Opinion as to the Vital Contention Involved in this Argument.

That contention is (1) that from the fall of the censorship, in 1695, the press in England became free save so far as it was restrained by the law of libel; that from the time that doctrine became English law it became colonial law; (2) that from the time of the trial of Zenger, in 1734, the doctrine was established in the colonies that in all trials for criminal libel the juries were the judges of the law and the facts, and that in all the provisions of the State constitutions devised for the protection of freedom of discussion the existence of that right is either expressed or presupposed. If these contentions be true, then it is certain that at the time of the adoption of the first amendment the meaning of the term "the freedom of speech or of the press" was that every citizen of the United States had the right to speak, write, or publish whatever he pleased, free from all restraint save that imposed by the law of libel, under which he could demand that the criminality of the subject-matter of his utterance should be inquired into and passed upon by a jury of his peers, *as the sole and only tribunal that could consider the question at all.* Let us now ascertain how far this contention is supported by the American authorities. Here we naturally turn to the two famous libel cases which were the first to arise in the State courts after the organization of the Federal Government. The first is the great case of The People *vs.* Croswell (reported at length in Johnson's Cases, vol. iii, pp. 337–413), which arose out of an indictment, found in 1803 in Columbia county, New York, charging the defendant with the publication of a seditious libel against Thomas Jefferson, President of the United States. In the brief of Alexander Hamilton, who appeared for Croswell, can be found an exhaustive and matchless epitome of the law of libel as it was then understood by the most accurate and acute legal mind of that epoch. The vital questions involved were these: "1. Can the truth be given in evidence? *Are the jury judges of the intent and the law?*" Hamilton struck at the heart of the last question when, after maintaining that the control of the press rested with the courts alone, he said: "This

control cannot be safely intrusted to a permanent body of magistracy, and requires the effectual co-operation of court and jury." In the judgment rendered by Kent this statement was maintained as follows: "To deny to the jury the right of judging of the intent and tendency of the act is to take away the substance and with it the value and security of this mode of trial. It is to transfer the exclusive cognizance of crimes from the jury to the court and to give the judges the absolute control of the press." In the very year in which this case was tried there arose in Pennsylvania (4 Yates, 267) the case of Respublica *vs.* Dennie, in which, upon an indictment for a criminal libel, the following exposition of the law was given: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, or print on any subject, *being responsible for the abuse of that liberty.* * * * What is the meaning of the words 'being responsible for the abuse of that liberty' if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? The expressions relate to and pervade every part of the sentence. The objection that the determination of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them when party spirit runs high in other criminal prosecutions. *But we have no other constitutional mode of decision pointed out to us, and we are bound to use the method prescribed.*" Story (Hist. of the Const., vol. II, 610), in explaining the meaning of the first amendment, says: "It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation, and so always that he does not thereby disturb the public peace or attempt to subvert the government. *It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel.*" He then goes on to explain that any abuse of the privilege can only be punished when the writings "published shall, on a fair and impartial trial, be adjudged of a pernicious tendency." He further says that even under constitutions which assert that "the

liberty of the press ought not to be restrained," and no more, the restraints and protections imposed by the common law of libel are implied (*id.*, 617). In the leading case of the Com. *vs.* Blanding, 3 Pick., 304, Parker, Ch. J., said on this subject, speaking of the Massachusetts constitution: "Nor does our Constitution or declaration of rights abrogate the common law in this respect, as some have insisted. The sixteenth article declares that "liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this Commonwealth. * * * The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse." Judge Cooley, in his great work, says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals; or, to state the same thing in different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication as long as it is not hurtful in its character, when tested by such standards as the law affords. *For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established and in reference to which they have been accepted*" (Cons. Lim., 321, 5th ed.). Authorities could be extended without limit to show that all the provisions contained in American constitutions, State and Federal, for the protection of freedom of speech and of the press, have been uniformly construed, and the result of that construction is that these provisions simply re-establish in America the English rule as declared in Mr. Fox's libel act—no more, no less—that is to say, the term "freedom of speech or of the press," as contained in the first amendment, was simply the fixed definition of the right to freedom of discussion as then settled in the law of the land, and that was the right of every citizen to speak, write, and print whatever he pleased, subject only to the contingency, if he injured

the public, of being accused in an information or indictment of an offense under the law of criminal libel, which offense could be tried by a jury alone.

The Alien and Sedition Laws.

This elementary and fundamental right of every citizen to have every accusation which might be brought against him by reason of any publication which might be deemed injurious to the public interest or morals tried by a jury of his peers was frankly recognized in the most radical piece of legislation—always excepting the act in question—which has ever issued from the Congress of the United States. Reference is made, of course, to the alien and sedition laws enacted under circumstances of great excitement in 1798. Although the sedition act declared it a public crime for any person to write, print, utter, or publish any false, scandalous, and malicious writing against the Government of the United States or either house of Congress or the President with intent to defame them or bring them into contempt, it was careful to provide that the truth of the writing or libel might be given in evidence; *and that the jury, before whom alone the accusation could be tried, should have the right to determine the law and the fact, under the direction of the court, as in other cases.* For prosecutions under this law see Lyon's case, Cooper's case, Haswell's case, Callender's case (Wharton's State Trials, 333, 659, 684, 688). It had not then entered into the brain of any American lawyer, statesman, or partisan *that the Congress had the right to assume judicial functions and to adjudicate what kind of a publication constitutes a criminal libel at common law.* After all the cases have been examined, State and Federal, in which any attempt has ever been made to determine whether a given publication was or not a violation of the law of criminal libel, it will be found that no one had ever disputed, prior to the passage of this act, the sole and exclusive right of a jury to consider and determine that question. If, then, the conclusion which has now been reached, that the very soul and essence of the right to "freedom of speech or of the press," as defined in the first amendment, is the right of every citizen accused of uttering a criminal libel, either by speaking, writing, or printing, to have the fact whether it is such

or no considered and determined by a jury of his peers—and not by any other body or functionary—it is clear that any subsequent act of Congress which attempts to take away, in whole or in part, or abridge in any way that right as then defined, is clearly unconstitutional and void.

Effect of Constitutional Limitations upon Legislative Power.

Our system of constitutional limitations upon legislative power is an American invention which rests upon the doctrine of the sovereignty of the people as distinguished from the sovereignty of Parliament. The practical effect of the system is that it seizes upon a right as defined by law at a given time, and then stereotypes it forever by placing it beyond the possibility of change by subsequent legislation. The right thus crystallized becomes a "vested right"—a kind of right which a citizen may possess either as to his personal liberty or as to his property. In the case before us the first amendment has put it beyond the power of Congress to take away from the citizen any of the rights, privileges, or safeguards guaranteed by the law of the land at the time of its adoption, so far as his right to freedom of discussion is concerned. As Judge Cooley has well expressed it, "The constitutional freedom of speech and of the press must mean a freedom as broad as existed when the Constitution which guarantees it was adopted. * * * The constitutional provisions do not prevent the modification of the common-law rules of liability for libels and slanders, but they would not permit bringing new cases within those rules when they do not rest upon the same or similar reasons." Const. Lim. p. 531, citing Respublica *vs.* Dennie, 4 Yates, 267, heretofore quoted to the effect that in prosecutions for criminal libel the question of criminality can be tried by a jury alone. The liberty of the citizen can be subsequently *enlarged* by a modification of restraints which originally existed in the common law, but it cannot be *abridged* by adding any new restraint or taking away any protection which existed in that law when the limitation was imposed.

Does the Act in Question in Fact Abridge any Right or Take Away any Protection which the Citizen Possessed under the Law of Criminal Libel at the Time of the Adoption of the First Amendment?

That is the crucial question upon which the fate of this act depends. As to its intent and purpose there can be no possible difficulty. Its draughtsman, animated by Strafford's policy of "thorough," boldly pressed the legislative knife to the point he desired to reach. And yet, although the act clearly defines upon its face the power which it assumes Congress can exercise in abridging the freedom of speech and of the press, still it may be instructive to cite a part of the report made to the House of Representatives by its Committee on Post Offices and Post Roads—a report which was subsequently adopted by the same committee of the Senate. (For House report see No. 2844; for Senate report, see No. 1579, 1st session, 51st Congress.) This remarkable document, which is destined to become the leading curiosity of our constitutional literature, thus concludes: "It is not the object of this report to debate the question as to whether lottery companies are inimical to public morals, or of immoral tendency. The day is passed for such discussion. It is admitted, or probably not seriously denied, that the existence of such swindling schemes is promotive of the spirit of gambling and results in serious disaster to many citizens. That Congress is willing to provide any remedy for the correction of these evils, within the letter and spirit of the Constitution, will be treated as an accepted fact; and the committee has therefore proceeded in its work with the view of providing a law which it is believed will place within the reach of *executive officers* and within the jurisdiction of the courts every means that can be adopted to crush out the baleful influences of these concerns, whether chartered by the States or organized and protected outside of the laws." Adopting, then, the startling assumption of its committees, that it is an official censor and guardian of the public morals, *the Congress proceeded to* ADJUDICATE *the supreme and vital question that all utterances touching lotteries, whether written or printed, are im-*

moral. That being settled, it proceeded to further *adjudge* specifically that every "letter, postal card, or circular concerning any lottery," and every "newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery"—every such publication being, in the language of the committee, "inimical to public morals, or of immoral tendency"—is a criminal libel. Such must have been the judgment of Congress, because such utterances could not have been prohibited unless they were criminal, and they could not be criminal unless they were libels. The fact that the sole and exclusive right to determine whether the contents of a publication, whether a letter or a newspaper, is libelous or not *by reason of its immoral tendency* is confided by the Constitution to juries alone does not seem to have received consideration. The Congress boldly assumed the right to adjudicate that question; and, having ascertained that the publications named were criminal libels against public morals, it proceeded to impose upon their authors, if they should dare to circulate them through the mail, not only a corrective punishment in the form of fine and imprisonment, but also a preventive punishment in the form of a power vested in executive officers to exclude the publications or letters themselves from the main artery of circulation, after the manner of the medieval censorship. *The radical vice of this act is its attempt to withdraw from the consideration of all courts the fact whether a publication concerning a lottery is libelous or not by reason of its immoral tendency.* The act itself undertakes to adjudicate that vital question, and then leaves it to the jury to say only whether such a criminal libel was in fact sent through the mails by a particular defendant or not. *In other words, Congress has attempted to usurp the judicial function which Mansfield contended belonged rightfully to the judges alone—the right to determine what constitutes a criminal libel, leaving it to the jury to ascertain only the fact of publication.* This position is susceptible of absolute demonstration. Suppose Congress should see fit to enact that any person who shall, in the language of this act, knowingly deposit or cause to be deposited, knowingly send or cause to be sent, in the mail any newspaper, pamphlet, or publication of any kind containing a criticism of any kind touching the Government of the United States or any of its officers shall be guilty of a mis-

demeanor. The instant outcry would be that under our system of liberty and law no one can be punished for any publication touching the Government or its officers until the publication itself has first been ascertained to be criminal in a court of justice, and that even there the character of the publication can be passed upon by a jury alone. These principles even the sedition act frankly recognized. In the case assumed Congress would not only invade the domain of the judiciary by attempting to adjudge that any criticism touching the Government or its officers is from its very nature a crime, but it would also usurp within that domain a function which not even a judge can exercise. No method of argument can demonstrate that Congress has a greater right to invade the sacred domain of the judiciary in order to adjudge beforehand, and without a hearing, that any utterance touching a lottery is a criminal libel than it has to invade the same domain in order to adjudge beforehand, and without a hearing, that any criticism touching the Government or its officers is a criminal libel. In the face of such a monstrous usurpation of judicial power as this act attempts, under a system of Government which sternly forbids any encroachment by the legislative upon the judicial power, it is hard to be serious. The assumption is so grotesque as almost to preclude argument. This Court not long ago, speaking through a courageous defender of the Constitution whose lightest words were weighty, tried to convince Congress that it was not a court. In the great case of Kilbourn *vs.* Thompson (103 U. S., 168–205) this Court, speaking through the late Justice Miller, said: "If what we have said of the division of the powers of the Government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or in either branch of it, save in the cases specifically enumerated, to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make was one that was judicial in its character, and which could only be properly and successfully made by a court of justice, *and if it related to a matter in which relief or redress could be had only by a judicial proceeding*, that the power attempted to be exercised was only confided by the Consti-

tution to the judicial and not to the legislative department of the Government. We think it equally clear that the power asserted is judicial and that it is *not* legislative." If the question should here be asked how it was that Congress, with this reminder ringing in its ears that it is not a court, should have attempted so bold an assumption of judicial power as this act embodies, the best answer can be found in the Congressional Records, where the fact appears that this act was not only not referred to the Judiciary Committee of either House, but that it actually passed through both without a word of debate or comment from any quarter. It must have threaded its way through the Houses on tip-toe, when the guardians of the Constitution were asleep.

And in this connection it may be well to consider the absolute unsoundness of the judicial ascertainment made by Congress, even assuming its right to make it at all. Upon what possible theory could Congress adjudge that a communication touching a lottery was libelous by reason of its immoral tendency? In passing upon the question it was, of course, excluded from the consideration of any changes which may have been made in the law since the adoption of the first amendment. As heretofore pointed out, lotteries were not only not illegal at common law, but were from 1778 to 1825 expressly sanctioned by Parliament; and, besides, as the United States has no common law defining crimes, Congress could not hold that lotteries were illegal unless they had been expressly made so by some statute of the United States enacted prior to the adoption of the first amendment. In the case of The United States *vs.* Hudson *et al.* (7 Cranch, 32) it was held that the courts of the United States have no common-law jurisdiction in cases of libel against the Government of the United States. In that case this Court tersely said: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." Only in that way can Congress provide for the punishment of crime, and in the matter before us all the necessary steps are wanting. In the first place, Congress never made lotteries illegal by any act passed before the first amendment; in the second place, it never prescribed any penalty for sending publications through the mail

concerning lotteries prior to that time; and in the third place, it has refused to submit to the jurisdiction of any court the real question which must be settled before any penalty can be imposed. We therefore arrive at the following conclusions:

First. Congress has usurped a purely judicial function in attempting to adjudicate the fact that publications touching lotteries are criminal libels.

Second. Admitting its power to consider the question at all, it has adjudged an act to be a crime, upon which it imposes a two-fold penalty, which as a matter of law never was at the time in question in any sense illegal.

In attempting to reach this monstrous result the Congress has not only violated *the common-law rights* which the first amendment secures to every citizen, but it has also violated the following express provisions of the Constitution, in which those common-law rights are again separately and severally guaranteed. In attempting to adjudge that a publication concerning a lottery is a criminal libel, the Congress has violated article III, section 2, which provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." In attempting to take away from the citizen the liberty of sending a newspaper or letter through the mail concerning a lottery without a judicial investigation of the question whether or no such an utterance is illegal, the Congress has violated the fifth amendment, which provides that no person shall "be deprived of life, liberty, or property without due process at law." In attempting to adjudge beforehand in a legislative act, in the absence of the accused, that any publication that he may make on a given subject is illegal, the Congress has violated the sixth amendment, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the assistance of counsel for his defense." Without any of these protections or safeguards, the petitioner, in his absence, has had it adjudged against him beforehand by the Congress, and not by a jury of his peers, that the publication contained in his paper was an illegal and immoral publication and as such a criminal libel—despite the fact that it never was made illegal or immoral by statute or common law, prior to the adoption of the first amendment. In the face of these facts, is it not more than idle to contend that the right to "freedom of speech or of the press," as defined in the common law of libel embalmed in the first amendment, has not been abridged by the act in question, which *cuts out the very heart of the common-law protection* by transferring the vital question of the criminality of the subject-matter of the publication from the juries of the country to the Federal legislature. The establishment of the right in juries alone to say when a publication is moral or immoral, legal or illegal, is the sum and consummation of the entire struggle for the right to freedom of opinion which the English race has carried on against every obstacle during a period of more than two hundred years. No English subject, no American citizen, can be punished, directly or indirectly, on account of any publication until it has been first adjudged to be a criminal libel by a jury of his peers. In the words of Mr. Dicey: "Who are to determine whether a given publication is or not a libel? The reply (as we all know) is that in substance this matter is referred to the decision of a jury. Whether in any given case a particular individual is to be convicted of libel depends wholly upon their judgment." (Law of the Const., pp. 230–31.)

An Illustration Drawn from the Federal Statutes as to Immoral Literature.

The fact that the act in question does embody an attempt upon the part of Congress to usurp a purely judicial function stands out with perfect distinctness when it is read side by side with those sections of the Revised Statutes which provide for the punishment of all persons who send through the mails obscene and immoral literature. Those sections are perfectly constitutional

and valid, for the simple and conclusive reason that they embody only the common-law restraints which Congress can constitutionally exercise in the regulation of the mails, and because they provide for the enforcement of such restraints only *through the verdicts of juries*, in the form which the common law provides.

The principle has been asserted throughout that the "freedom of speech or of the press" is protected by the first amendment, subject to all the restraints which the common-law imposed upon that freedom at the time of its adoption. Foremost among these restraints is that one which makes it a crime for any one to circulate any kind of literature tending to corrupt public morals. It has been expressly held that that branch of the English law of criminal libel became a part of the American common law, and as such is enforceable "in the common-law tribunals of this country" (Bishop on Criminal Law, vol. 11, sec. 811, citing Com. *vs.* Holmes, 17 Mass., 336; Com. *vs.* Sharpless, 11 S. & R., 91; Bell *vs.* The State, 1 Swan, Tenn., 42). Congress having, therefore, *by virtue of the common law of libel, which is part and parcel of the definition contained in the first amendment*, the right to provide for the punishment of all persons circulating immoral literature through the mails, has proceeded to do so in the manner which that law directs. It has recognized the rule heretofore quoted from U. S. *vs.* Hudson, which says "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." By the authority of the first amendment Congress has revived the common-law offense of circulating immoral literature, has affixed the penalty, and then has designated the courts in which the vital question, whether a book or paper passing through the mails is moral or immoral, shall be tried. For the sake of illustration let us glance for a moment at the procedure employed in the prosecutions under the immoral-literature act in the following cases: U. S. *vs.* Bott, 11 Blatch., 346; U. S. *vs.* Foote, 13 *id.*, 418, and U. S. *vs.* Bennett, 16 *id.*, 343. In all these cases the accusation was made, and the trial conducted according to the constitutional method, *the vital question as to the morality or immorality of the publications being submitted to the jury under the charge of the court, according to the course of the common law.* In the case last named

the book charged to be immoral was put into the hands of the jury for examination, and they ascertained by their verdict of guilty that it was of an immoral character. The important part of the court's charge to the jury was as follows: "The only question, therefore, which you are called upon to decide is whether or not the book is obscene, lewd, or lascivious, or of an indecent character. Now you have had this book in your hands, and the district attorney has marked certain passages, * * * and therefore you may confine your attention to the marked passages as the matter which you are to determine upon." Here we have all the constitutional safeguards which the first amendment embodies strictly observed. The principle that the jury alone can pass upon the criminality of the subject-matter of the publication is the basis of the whole system. Suppose Congress in drafting these acts had seen fit to ignore that principle, and had undertaken to withdraw from courts and juries the fact whether given publications are in fact obscene and immoral. Suppose Congress should so amend the statutes upon the subject of immoral literature as to make them *enumerate such books* as Congress might consider hurtful to the public morals. Let us suppose such an act in which Congress, after *adjudicating* that the Kreutzer Sonata and the Memoirs of a Lady of Pleasure are immoral books, should prescribe a penalty to be imposed upon the sender of them through the mails whenever the fact of sending has been ascertained by a court of competent jurisdiction. Could anything be more obvious than the unconstitutionality of such an act, for the simple reason that the right of the defendant to have the criminality of the subject-matter of the publication in question passed upon by a jury of his peers would be taken away from him. The judicial inquiry would be confined to the single question whether or no the defendant sent through the mails such a publication as Congress had adjudged in advance was a criminal libel at common law, without the presence of the defendant and without any of the forms of law; and yet the case supposed is in no particular stronger than that actually before the Court. In the act now in question Congress has attempted to adjudge in advance that every publication touching a lottery, whether contained in a letter, newspaper, or a circular, is a criminal libel, and the fact

whether it is so or not is expressly withheld from all courts whatsoever. Only the fact whether a particular person has sent through the mails such a publication as Congress has *adjudged* to be illegal is submitted for judicial consideration. Congress is not even willing to admit the law to be as Mansfield contended; it is not even willing that the criminality of the subject-matter of publications touching lotteries should be determined by the judges; it insists in this act upon its own right to make the adjudication.

Advertisements a Vital Part of a Newspaper.

No apology can be made for the congressional censorship attempted to be established by this act by the suggestion that its supervision, so far as newspapers are concerned, extends only to advertisements. Nothing is better settled in the law of the press—the law of libel—than the fact that advertisements are integral parts of the publication which stand upon the same footing with every other part. (See Harrison *vs.* Pierce, 1 Frost & F., 567; Parret *vs.* New Orleans Times, 25 La. An., 170; Robertson *vs.* Bennett, 44 N. Y. Superior C't, 66; Simmons *vs.* Holster, 13 Minn., 249; Zier *vs.* Hofflin, 31 Minn., 66; Holiday *vs.* Ontario F. M. I. Co., 33 Up. Can. Q. B., 558.) The fact is that advertisements are the vital part of the American newspaper—a fact which did not escape De Tocqueville, who said: "A glance at a French and an American newspaper is sufficient to show the difference which exists in this respect between the two nations. In France the space allotted to commercial advertisements is very limited. In America three-quarters of the enormous sheet are filled with advertisements" (Democracy in Am., vol. 1, p. 235). If you take away from the American newspaper the right to contain advertisements you take away from it its business vitality. If you take away from it the right to circulate through the mail you extinguish the last spark of its life. That fact this Court recognized in *Ex parte* Jackson, 96 U. S., 727–738, where it is said *arguendo:* "Nor can any regulation be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulation is as essential to that freedom as liberty of publishing."

No Distinction to be Drawn Between Letters and Newspapers.

The definitions heretofore given of "the right to freedom of discussion"—the equivalent of our constitutional term "the freedom of speech or of the press"—have all been found to mean simply that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right." No possible difference grows out of the form of the writing. As Mr. Dicey has so lucidly expressed it, "Neither the Government nor the courts (speaking generally) have any greater power to prevent or oversee the publication of a newspaper than the writing of a letter. Indeed, the simplest way of setting forth briefly the position of writers in the press is to say that they stand in substantially the same position as letter-writers. A man who scribbles blasphemy on a gate and a man who prints blasphemy in a paper or in a book commit exactly the same offense and are dealt with in England on exactly the same principles" (The Law of the Constitution, p. 234, citing Rex *vs.* Pooley, cited Stephen, Digest of Criminal Law, art. 161). So a man who prints matter concerning a lottery in a newspaper which he mails and a man who writes concerning a lottery in a letter which he mails stand in identically the same status under this law. The only theory under which either the letter or the newspaper is interdicted and the senders of them punished is that both contain matter which Congress has adjudged beforehand to be a criminal libel. If Congress can render this judgment as to the contents of the one, it can as to the contents of the other. It is true that the fourth amendment, which guards "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures," etc., has been construed to extend to sealed letters and packages in the mail, which can only be examined under warrant issued upon "oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." (See *Ex parte* Jackson, cited above.) But this safeguard only relates to *the manner of finding out* what the letter contains. Let us suppose that

the legal method has been employed and the fact ascertained that the letter in question found in the mails concerns a lottery. The only ground upon which it can be excluded is that its subject-matter is immoral and illegal—that is, that Congress has adjudged it so to be. This illustration as to letters is employed only to emphasize the fact that the entire act is pernicious and unconstitutional in the fundamental principle upon which it rests as a whole, and which pervades every part of it. The radical vice of the act is the usurpation by Congress of the judicial function of determining beforehand, without a hearing and without due process of law, the fact that the contents of any letter or newspaper concerning a lottery is against public morals—that is, that it constitutes a criminal libel at common law—a judgment which can only be rendered by a jury after a trial conducted under the forms of the common law. If the court shall ascertain that the act is infected with this fundamental vice, it must "lay the ax at the root of the tree" and destroy it as a whole.

The Reductio ad Horribilem (Horribile?)

Canon Farrar, in one of his brilliant books, tells us that alongside of the method of argument known as the *reductio ad absurdum* stands a kindred method, which he calls *reductio ad horribilem.* This method, which is used to demonstrate the hurtful consequences which will inevitably result from the establishment of certain premises, may be profitably employed in this argument to demonstrate how the whole fabric of freedom of opinion, which has been so slowly and painfully built up under our system of Anglican law, will be subverted and overthrown in this country if this Court shall recognize as constitutional the attempted usurpation which this act embodies. If Congress shall be recognized as an official censor of public morals, if the power shall be confided to it to look into the contents of all newspapers and letters which pass along the great highway of the mail, and not only prevent their circulation, but punish the authors and senders of all such matter as it may adjudge to be immoral or hurtful to the public interests, then there will be established in the Federal legislature such unlimited powers over opinion as are not now

claimed by the national assembly of any other one of the constitutional countries of the world. If Congress can prohibit the circulation of a newspaper because it contains the advertisement of a lottery company, it can, of course, prohibit it if it should contain an editorial commending lotteries as useful institutions. With that admitted, who could deny the general authority of Congress to prohibit the circulation through the mails of all newspapers which might contain comments upon any other subject which had passed under the ban of its displeasure. If the prohibitionists should come into power in both branches they could prohibit the circulation of all newspapers advertising for sale wines or liquors. If an anti-masonic party should come into power, it could prohibit the circulation of all letters and newspapers touching the affairs of that ancient and honored institution; or, what is a still more reasonable presumption, if a political party in possession of the executive and legislative departments of the Government should resolve to silence the journals of its adversaries, it could enact that as all utterances which dispute its tenets and policy are *hostile to the public interests and morals*, the mails should be closed to all such communications, whether public or private. If an official censorship is once admitted to exist in Congress at all, there is no limit to the consequences which will flow from the monstrous assumption.

The Imperial Theory of Droit Administratif.

What has so far been said touching the validity of the act in question has been specially directed against its *corrective* as distinguished from its *preventive* aspect, for the reason that only the corrective side of the act is directly involved in the case before the Court. And yet the real and despotic character of the act cannot be fully understood without some reference to that phase of it which attempts to commit to *executive* functionaries the *preventive* power to inspect the contents of the mails, and to reject without judicial inquiry or authority all such matter as Congress has seen fit to enter upon its "*Index Expurgatorius*," after the manner of the medieval censorship. It is hard to account for the appearance of a principle so foreign to the spirit of American

legislation. The mind that conceived the idea of engrafting this exotic upon our Anglican system must have been nurtured in the French schools of law, where it became imbued with the imperial theory of *droit administratif*.

Only by the aid of this theory, so hard for Englishmen and Americans to understand, can the administrative and preventive phase of this act be clearly explained. Down to a very recent period, in France literature has been regarded as the special concern of the state, under all governments, whether royal, imperial, or republican; and the body of law under which the press in France has been controlled fills a large place in the history of French legislation. The underlying principle of the censorial system under which the French press has heretofore been governed is that of *droit administratif*—a term having no exact equivalent in English legal phraseology—which has been defined to be "the body of rules which regulate the relations of the administration or of the administrative authority towards private citizens" (Aucoc, *Droit Administratif*, 1, s. 6). Of this law it has been said that, "especially in France, servants of the state are in their official capacity to a great extent protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject to the official law, administered by official bodies. This scheme of so-called administrative law is opposed to all English ideas, and by way of contrast admirably illustrates the full meaning of that rule of law which is an essential characteristic of our Constitution" (Dicey, the Law of the Const., 303). The absence of the principle of *droit administratif* from the constitutional system of the United States, De Tocqueville was quick to recognize. (See *Œuvres Complétes*, VII, p. 66.) The leading characteristic of our administrative system is that all public officials which carry it on are governed by the ordinary law of the land as administered in the ordinary tribunals. They are not protected by a special administrative code made especially for their benefit and construed by a special tribunal in their interest. Under the English and American administrative systems the illegal act of any public functionary can at once be assailed in an ordinary law court, and thus the authority of what we call the supremacy

of the law is upheld. Of this principle, Professor Lieber, in his work on Civil Liberty and Self-Government, p. 91, has said: "The guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been in our system of liberty the natural production of a thorough government of law as contradistinguished to a government of functionaries." Since the enactment of the statutes in question, which propose to bridle the freedom of speech and of the press in America with the peculiar rules of *droit administratif*, we have witnessed some of the strange spectacles which are liable to occur whenever the infractions of a system of administrative law are submitted, not to the courts, but to functionaries charged with its execution. We have of late not only seen Congress posing as a censor of public morals, but we have witnessed the more startling spectacle of a high executive functionary, under its pretended authority, assuming to himself censorial powers, and solemnly passing upon the question whether a certain book from the realms of the Tzar should be excluded from the mails or not by reason of its immoral tendency. This Pickwickian performance served no doubt a good purpose in pointing out to the people of the United States the strange shores upon which they may drift whenever they depart from the beaten paths of the Constitution, or forget even for a moment the inestimable value of a "thorough government of law, as contradistinguished to a government of functionaries."

This argument ends, therefore, in the conclusion that both aspects in which this act appears are alike offensive to the constitutional limitation by which the freedom of the press in the United States is protected against abridgment by the Federal legislature. The first aspect, with which we are not directly concerned in this case, embodies the *preventive* principles of the medieval censorship, whose enforcement was entrusted to *executive* functionaries armed with the power to determine beforehand, after an inspection of the subject-matter, whether a publication should circulate or not. This aspect of the act must fail, because the power to impose such a restraint upon a fundamental right—a restraint which had perished in England a century be-

fore the American Revolution—has never been vested by the American people in any legislative assembly, State or Federal. The second aspect, which may be called the *corrective* side of the act, embodies an attempt upon the part of Congress to adjudicate that all utterances, whether written or printed, touching an enterprise which was perfectly legal, both in England and America, at the time of the adoption of the first amendment, are criminal libels, leaving to the courts only the fact of their publication for judicial investigation. This aspect of the act must fail because no new restraint upon the freedom of the press, which did not exist at the date of the first amendment, can be imposed by subsequent legislation; and because the very soul and essence of the common-law protection embodied in the first amendment is the right of every citizen to have the criminality of the subject-matter of every publication made by him passed upon and determined only by a jury of his peers and not by any parliamentary body or functionary whatsoever.

Reply to the Brief for the Government.

Fifteen out of the eighteen pages of the brief filed by the Government in support of the constitutionality of the act in question are devoted to the maintenance of the proposition that, if the original power vested in Congress to create and regulate a postal system was absolutely unrestrained by other provisions of the Constitution, the right of exclusion which the act of September 19, 1890, has attempted to exercise would undoubtedly be valid. So far, then, as this argument is concerned,—which rests exclusively upon the proposition that the act in question is a violation of the subsequent limitation in favor of the freedom of the press contained in the first amendment,—the first fifteen pages of the Government's brief embody only a pointless abstraction. Early in those pages (page 3) we are told that "how far this power 'to establish post offices and post roads' is subject to other provisions of the Constitution is a matter for after consideration." But when the place for the "after consideration" is reached, we are disappointed by the strange assertion (page 15) that, "if the preceding argument is sound, the fine and instructive discussion of the de-

velopment of the law of libel by the counsel on the other side has no particular application here." It is hardly necessary to say that the practical effect of the first amendment can only be explained through a discussion of the law of libel, because, as Judge Story has said, "*It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel*" (Hist. of the Const., vol. II, p. 610). The Government therefore contents itself with the paradoxical conclusion that, as it has demonstrated the fact that the power of exclusion which Congress has attempted to exercise would undoubtedly be valid if the first amendment had never been adopted, it is entirely unnecessary now to discuss what the effect of that amendment really is. This dilemma, in which the Government has involved itself through its attempt to ignore the existence of the special limitation in favor of the freedom of the press contained in the first amendment, runs through its whole argument. Only in that way is it possible to account for the following paragraph: "It must be admitted that newspapers of all kinds might be excluded from the mails. That they have so long enjoyed the privilege of that service is no reason for saying the privilege is irrevocable. As well might it be said that Congress could not exclude merchandise from the mails on a similar ground." This strange confusion of ideas could scarcely have occurred if the fact had been recognized that the very essence of the freedom of the press, which the first amendment guarantees, is the right of circulation,—*not along the highways of commerce over which the Congress could not possibly exercise any control in this regard*,—but along the great highway of the mail, the only highway which the Government maintains and controls. The first amendment, together with the eleven which follow it, has been declared by this Court to contain limitations, *not upon powers which the Federal Government never possessed*, but upon the powers actually vested in it by the Constitution in its original form. As the only power thus vested, whose exercise could possibly abridge the freedom of the press, is the power to regulate the mails, to that power only can the freedom-of-the-press clause of the first amendment apply. If that be true, then the very essence of the freedom of the press which the first amendment guarantees is the irrevocable right of

all newspapers to circulate through the mails, subject only to such implied restrictions as that amendment embodies. In view of this right to circulate through the mails, specially guaranteed by the Constitution to newspapers, how idle it is to contend that they stand on the same plane with merchandise, which is entitled to no such protection. Of a piece with this contention is that one which attempts to excuse the assault made under this act upon the right of newspapers to circulate through the mails by the assertion that it does not attempt to exclude them because of "discussions in them of any kind or on any subject," but "because they contained lottery advertisements." As heretofore pointed out, nothing is better settled in the law of the press—the law of libel—than the fact that advertisements are a vital and integral part of a newspaper, which stand upon the same footing with every other part. The power which can dictate what advertisements a newspaper shall contain can dictate what editorials it shall contain. The distinction which has been attempted has no basis, either in reason or authority. It may, however, be ungracious to expose too severely the inconsistencies of an argument which the writer himself tells us was prepared "at so short notice as to leave him little time for reflection and none for research."

Respectfully submitted.

HANNIS TAYLOR,
Counsel for the Petitioner.

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In the Supreme Court of the United States.

OCTOBER TERM, 1891.

EX PARTE, JOHN L. RAPIER, No. 7, ORIGINAL.

EX PARTE, GEORGE W. DUPRE, No. 8, ORIGINAL.

EX PARTE, GEORGE W. DUPRE, No. 9, ORIGINAL.

BRIEF FOR THE UNITED STATES.

W. H. H. MILLER,
Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

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BRIEF FOR THE UNITED STATES.

Each of these cases is an application for a discharge by writ of habeas corpus from arrest for an alleged violation of the anti-lottery legislation of the United States (26 Statutes at Large, p. 465).

Petitioner Rapier was arrested under an information in the district court for the southern district of Alabama.

Dupre was arrested under two indictments in the circuit court for the eastern district of Louisiana.

The charge against Rapier and against Dupre, in one indictment, was the mailing of a newspaper containing an advertisement of the Louisiana Lottery, and the other indictment was for the mailing of a letter concerning the lottery.

In *Ex parte Jackson* (96 United States, p. 727), nearly 15 years ago, the exact question mooted in these cases arising in the same way was fully considered and unanimously decided by this court. Since that time the principle of that decision has been accepted by the people, by Congress, by the executive officers of the Government, and by the courts, as the settled law of the land; and well it might be, for in making that decision this court said:

> The only question for our determination relates to the constitutionality of the act, and of that we have no doubt.

Ordinarily, under such circumstances it would seem that the question of the constitutionality of the legislation involved should be deemed settled. It seems, however, otherwise. The revenues poured into the coffers of the Louisiana Lottery Company by its witless victims are too large to be surrendered without another struggle. A very small per cent. of those revenues suffices to pay for making a new contest. Accordingly, nothing daunted by the fact that this nefarious scheme is under the ban of public opinion, of legislative enactment, and of judicial decision, the most eminent counsel in the land are here, making a very astute but as I think a very sophistical, presentation of a bad cause.

As was to be expected in such a cause, the main effort of counsel for petitioners in each of the briefs seems to be to becloud the issue. To this end their entire arguments assume that the refusal of the General Government to be the instrumentality for the circulation of lottery literature is the same thing as forbidding the publication or circula-

tion of such literature; that the only escape from a violation of the prohibition in the first amendment to the Federal Constitution against making "a law abridging the freedom of the press" is for every official of the Post-Office Department to become the servant and every carrier the errand boy of the Louisiana Lottery Company.

They totally ignore the fact that the sole effect of the act of Congress is that the General Government, its officers, employés, and agencies, shall in no way aid or abet this business; that its mail-bags and the hands of its servants shall not be used in spreading and manipulating snares for its unwary victims; that it simply says to Federal officials "hands off."

In like manner, and for like purpose, it is assumed that the question here is dependent on the law of criminal libel, and the court is favored with a most elaborate and learned history and discussion of that subject in England and in this country; very edifying and instructive, but, with due deference it is submitted, quite irrelevant here.

In Mr. Taylor's brief much space is devoted to the argument that this law is invalid, because Congress attempts to determine the moral quality in lottery literature, instead of leaving that question to a jury; as if that were not a common exercise of the legislative function with reference to "mala prohibita" not dependent on criminal intent. (*In re* Coy, 127 U. S., 754–5.)

So in the brief of Mr. Semmes, much stress is laid on the fact that Louis the Fourteenth, George Washington, and even preachers of the Gospel have in times past believed in and profited by lotteries. He might have added that persons no less illustrious and worthy, contem-

poraries of these same men, in France, England, and in this country, believed in and encouraged the use of the Holy Inquisition and the burning of heretics, Quakers and witches, in the interest of "pure and undefiled religion;" yet, it will hardly do to insist that the Government of the United States would, therefore, be bound to lend its aid to such practices, in the interest of constitutional liberty, if an attempt were made to revive them now.

As the same questions, substantially, are presented in the briefs of each of the counsel, this argument will be addressed mainly to that of Mr. Carter, as the most elaborate.

I.

The first point in the brief of Mr. Carter is stated as follows:

> The power of Congress is limited in two ways. First. It can exercise no power which has not been conferred upon it by the Constitution. Second. It can not exercise the powers which have thus been bestowed in ways and for purposes which the Constitution forbids.

I suppose that no lawyer will question either of these two propositions, and yet fifteen pages of his brief are devoted to argument in support of them.

Nor is it doubted that the incidental powers which Congress may exercise must be such as, in the language of the Constitution, are "necessary and proper" for carrying into execution powers conferred by the Constitution; or that what such incidental powers are, is a judicial question; or that the means provided must have relation to the end to be accomplished and must be legitimately within

the constitutional functions of Congress; or, that, while courts may not inquire of the motives of individual legislators, they may look at the necessary effect, and thereby judge of the purpose of legislation, and whether the same be what it really purports to be, or an evasion or roundabout way of accomplishing something else. But, while we do not question these general propositions, we do wholly dissent from the application that is attempted to be made of them in these cases. Thus, on page 8 of his brief, Mr. Carter says:

> A.—The legitimate *end* is to furnish mail facilities to the people of the United States; and this means to *all* the people of the United States.

We say this means to the people of the United States, without discrimination, who use those mail facilities for legitimate purposes, subject, however, always to discretion in Congress; that is, Congress has a broad discretion as to *what* may be carried in the mails, and as to *where* and when the same shall be carried. And, therefore, necessarily, it can not be bound to furnish mail facilities everywhere, for all purposes and to *all* the people of the United States.

But perhaps the most striking fallacy in this branch of the brief is in the conclusion reached on pages 19 and 20.

The writer, having attempted to demonstrate that any purpose or effect of Federal legislation not immediately and necessarily connected with the principal end of such legislation renders it void, on page 19 says:

> Applying this doctrine to the statute before the court, and inquiring what its natural and necessary effect and its manifest purpose are, no one will pre-

> tend that there is room for doubt. It was passed simply and solely for the purpose of disfavoring, and if possible of suppressing lotteries.

On page 20 it is said:

> And here the argument upon the particular question under discussion properly closes; for no one will assert that Congress has power to suppress lotteries any more than it has to suppress any other employment or pursuit. If Congress had enacted a law directly forbidding, under penalties, the carrying on of the lottery business in any State, there would be no hesitation in any court in declaring it to be unconstitutional.

It is thereupon deemed proven that, as direct legislation suppressing the lottery in Louisiana would be unauthorized, therefore this statute is void.

The trouble with this argument is, that it proves too much. The principle asserted is that any legislation by Congress forbidding the use of the mails in aid of the perpetration of any crime can have no validity, unless a federal law directly forbidding, under penalty, the perpetration of that crime would be a valid enactment. A law enacted by Congress for the punishment of murder within a State would be invalid; therefore, any law that forbids the use of the mails by conspirators in aid of the perpetration of such murder is invalid. A law forbidding the transportation of newspapers advertising bawdy-houses in Baltimore, or elsewhere in a State, in the language of this brief, "would be passed simply and solely for the purpose of disfavoring and if possible suppressing bawdy-houses." Paraphrasing the brief, "if Congress had enacted a law forbidding, under penalties, the carrying on

of the bawdy-house business in any State there would be no hesitation in any court in declaring it to be unconstitutional." Therefore, of course, a statute excluding bawdy-house advertisements from the mails is unconstitutional. Of course, illustrations of this kind might be multiplied indefinitely; but surely elaboration is unnecessary.

Nor will the distinction attempted further along in the brief between *mala prohibita* and *mala in se* relieve the situation. The argument of the first 15 pages of the brief culminates in the proposition that, because Congress has no power directly to deal with a particular crime within one of the States, therefore it can not deny those engaged in the perpetration of that crime the use of the mails, because that would be doing indirectly what might not be done directly; and in this there is no distinction between *mala prohibita* and *mala in se*. If Congress may forbid the use of the mails for literature tending to promote *mala in se*, which it could not legislate against directly, thereby "disfavoring and if possible suppressing" the same, what becomes of the *principle* that Congress can not enact laws that indirectly touch offenses which they could not punish directly.

This argument, I submit, is an excellent illustration of the embarrassment into which an excellent lawyer may be led by excessive zeal in a bad cause.

II.

In the second part of his argument, commencing on page 20, counsel is not more fortunate. Indeed, this second part rests upon two propositions: First, that which has just been under discussion, and which I think has been

shown to be baseless; and, second, the assumption that the right to operate a lottery is one of the fundamental rights of man, like the right to exercise a profession, as a physician (*Dent* v. *West Virginia*, 129 U. S., p. 114), or a trade, as a laundryman (*Yick Ho* v. *Hopkins*, 118 U. S., p. 356).

It would seem hardly worth while to spend time upon an argument resting upon such assumption. If it can be demonstrated that to prey upon one's fellow-men by means of a lottery is a fundamental human right, the Decalogue, and the Sermon on the Mount, not to mention the Declaration of Independence, ought to be rewritten at once.

One other assertion in the discussion of this second proposition of the brief ought to be noticed. On page 25, speaking of the grants to Congress of the power to legislate, it is said:

> The powers conferred upon Congress were mandatory, and the actual exercise of them was contemplated and required. And such exercise was to be for the equal and impartial benefit of all. They were *grants*, not to Congress to be dealt with as it might choose, but to the people, subject only to the regulation of Congress. We may borrow the maxim of equity and deem what was directed to be done as in fact done, and justly regard the powers thus bestowed upon Congress as a *completed gift* and grant to the whole people equally of the benefits and blessings intended to be secured by the execution of the powers.

This is certainly a very novel proposition. Over and over again it has been decided that many of the powers granted to Congress under section 8 of article 1 of the Constitution, not only may remain but have for many

years remained in abeyance, and while so in abeyance that the States might legislate, and they have in fact legislated upon the same subject. *Sturgis* vs. *Crowninshield* (4 Wheat., 122); *Ogden* vs. *Saunders* (12 Wheat., 213); *Leisy* vs. *Hardin* (135 U. S., 100); *Pound* vs. *Turck* (95 U. S.., p. 459); *Cardwell* vs. *American Bridge Company* (113 U. S. R., p. 205). Now, however, it appears that in all this Congress has been delinquent, has failed to obey the mandatory requirements of the Constitution. Petitioner's counsel therefore propose to treat these powers as self-executing, and, on the maxim of equity, that what ought to be done is to be taken as done, assume all needed legislation.

This certainly will save a world of trouble. It is no longer necessary to worry about the enactment of a bankrupt law. All we need to do is to assume the existence of such a law and act on it.

But seriously the proposition that these grants of power, including the grant to establish post-offices and post-roads, are mandatory, and that it was the duty of Congress at once to exercise every legislative power thus granted, will not bear argument. Under the power to pass a bankrupt law Congress has provided such law for three brief periods, not altogether over fifteen years out of a hundred. As to many, perhaps most, of these grants of power, the necessity for legislation has grown with the growth of the country. Take the case of post-offices and post-roads. Every decade the power granted to Congress has been exerted in new and extended legislation not only as to the methods and manner of postal facilities, but as to the subject-matter of postal transportation. Is it claimed that 100 years

ago, when the mails had to be carried largely upon horseback, it was the duty of Congress to provide facilities for the transportation of all the articles that are now carried in the mails? The question answers itself, and is answered in the history of all postal legislation and experience. The truth is that in the exercise of this, as in the exercise of many of its other powers of legislation, Congress has a very broad discretion whether it shall act at all; and, if so, how, where, to what extent, and for what purpose it shall act. As to the mails, this discretion goes to matter to be carried, the manner and frequency of such carriage, the places, the compensation therefor, indeed to the whole subject-matter.

III.

Having, in his own imagination, driven the defenders of this legislation from the grounds on which he had located them in his first two propositions, counsel for petitioner states what he regards as the only plausible defense of such legislation, viz, that the lottery is alleged to be of an immoral and injurious tendency. Thereupon he proceeds to show that the legislation is indefensible upon that ground.

In doing this he again assumes as his fundamental proposition that inasmuch as Congress can not pass a law directly suppressing lotteries in the States, therefore it can not indirectly suppress them, and therefore it must *aid* them in the transaction of their business through the mails. We have already seen that this position is wholly untenable, because it is conceded that Congress may refuse the use of the mails, and thus indirectly "disfavor, and if

possible suppress" many practices against which it can not legislate directly. Therefore, clearly, if Congress can not refuse mail facilities to lotteries, its inability to do so must rest upon some other principle than is involved in this argument of direct and indirect legislation. Indeed, this argument against the effect of indirect legislation is not only the fundamental argument of this brief, but it seems to be a favorite one with the author. On page 30 he says:

> Surely it is not contemplated that there shall be such a conflict between the direct legislation of a State within its conceded powers and an *indirect* attempt on the part of Congress to accomplish an object which it has no power to accomplish by *direct* legislation.

And yet exactly that kind of a conflict did arise, according to this court, in Leisy *v.* Hardin (135 U. S. R., 100), and on the suggestion of this court Congress passed an act with a view to reconciling that conflict (26 Stats. at Large, p. 313). But it is hardly worth while to further notice this so-called argument that the legislation of Congress can not indirectly disfavor what it can not directly suppress, because counsel himself admits that as to offenses *mala in se* such a limitation does not exist. In other words, he announces as the basis of his entire argument this general principle, and then gives his whole case away by admitting that as to most offenses his principle has no application. Such a principle in law is as valuable as the great discovery in science that the reason why water will rise above its surrounding level in an exhausted tube is "because nature abhors a vacuum;" and is subject to very much the same sort of a limitation as was necessary in re-

gard to the latter great discovery. To account for the fact that notwithstanding the great principle the water would rise only to a specific height, it was said that "nature abhors a vacuum only to the extent of 33 feet." So the learned counsel limits his fundamental principle, that Congress can not disfavor indirectly what it can not suppress directly, by the qualification that the principle applies only to offenses that our ancestors in England two or three hundred years ago regarded as involving an element of immorality and crime, viz, offenses at the common law *mala in se*. And yet, on page 39, counsel surrenders this position also; for he says:

> This distinction enables the Government to exclude from the mail all matter promoting such acts as *it* has the authority *to declare to be criminal offenses and to punish as such;* and also all matter promoting what were, at the time of the adoption of the Constitution (*and possibly what in the progress and development of our society may come to be*) universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, larceny, etc. And in this latter class the offense of circulating obscene books and pictures undoubtedly falls. This was a well-known offense at common law.

So on page 41, he says:

> It may be true that the criterion of *mala in se* changes with the lapse of time and the progress of society, and may eventually stamp lotteries as included in that class; but that time has not arrived so long as any State chooses to deem them innocent or indifferent; indeed not until the conviction of their evil tendency has become so universal and established as to make it in a high degree improbable that they ever will be allowed.

In other words, counsel admits and claims that his so-called principle is a very elastic one; that, with the change of public sentiment, the powers of Congress under the Constitution to legislate on this subject of what shall be carried in the mails advances or recedes, and that Congress can "disfavor" in the mails only such practices as at the time are universally in all the States regarded as *mala in se.*

If the limitation of Congressional power is a shifting line as thus asserted, by whom at any given time is that line to be fixed? Must Congress go to the courts to find out what practices it may prohibit, or are the courts to go to Congress for the definition of crimes? With due deference I submit that if public opinion is any factor in this problem Congress and not the courts is the exponent and judge of that public opinion.

There is a maxim that a chain is no better than its weakest link, and applying this principle, counsel insists that Congress shall recognize no morality higher than the lowest public sentiment to be found in any State; that is, the entire nation shall level down on this subject to the lowest instead of leveling up to the principle of common honesty.

According to this argument Congress would be forbidden to exclude from the mails newspapers advertising appointments for dueling, for in some parts of the country duels are not condemned by public sentiment, and within a few years have been in many States regarded with the highest favor. Dueling is certainly not *malum in se.*

Blackstone (vol. 4, page 168) says:

> All disorderly inns or alehouses, bawdyhouses, gaming houses, stage plays, unlicensed booths, and stages for rope-dancers, mountebanks, and the like are public nuisances, and may upon indictment be suppressed and fined.

Will counsel indicate which of these offenses might be "disfavored" in the mails, and which not, on the *mala in se* principle? They are all common-law misdemeanors, of the same grade as obscene libel, and certainly some of them not *mala in se*.

In the quotation above given from page 39 counsel seems to make the test of what was *mala in se*, and therefore what may be disfavored, the fact that the matter was an offense at common law. How this is to be reconciled with his statement, that, with the change of sentiment the subjects which may be disfavored by legislation of Congress also change, it is not for the Government to explain.

But counsel makes a long quotation from the opinion of Mr. Chief Justice Marshall in the case of *The Antelope* (10 Wheaton, 66), and seems to find great satisfaction in the declaration in that opinion that one nation alone does not make international law; that each nation only legislates for itself, and, therefore, the laws of the United States alone could not, as against the subjects of foreign nations, make the slave trade piracy. This is the first intimation, so far as my reading extends, that the relation of the United States Government to the different States of the Union, under the Constitution, is analogous to the the relation of the different nations of christendom to each

other, according to international law. But, without stopping to discuss that, it is suggested that if, in the case of the *Antelope*, the question had been whether the United States Government could be compelled by international law to become the agent of nations interested in and sanctioning the slave trade for the carrying forward of their nefarious projects, the decision would have had a much closer relation to the subject now under consideration. It would then have been found that this Government recognized no obligation to aid, and would not consent to become a party to such villainy as the African slave trade, just as it was found that it did become a party to the return of fugitives into slavery in the States, only because of the imperative requirements of the Constitution.

In brief, I maintain, without fear of successful contradiction, that whatever acts or enterprises Congress has the power to make criminal in the District of Columbia or the Territories, it may refuse, directly or indirectly, to aid, encourage, or abet in any State, without violating any obligation either to citizen or State.

Any State may make the practices of this lottery company or even the possession of its tickets within its borders with intent to sell, a crime. *Commonwealth* vs. *Dana*, 2 Mit. (Mass.) 329; *Boyd* vs. *United States* (116 U. S., 624).

It is certainly an anomaly, if, notwithstanding such legislation against the lottery in a given State, the general Government is bound to aid and abet such lottery in that State.

IV.

But without further discussion of this part of petitioners' brief, what is the position of the Government? As already stated, I maintain that in the exercise of this power of legislation in regard to the mails, as in the exercise of many of its other legislative powers, Congress has a very broad discretion as to whether it shall act at all, and, if so, when and to what extent, and for what purposes it shall act. As to the mails, this discretion goes to the matter to be carried to the manner and frequency and the places of such carriage, the compensation therefor, and, in short, the whole subject matter.

Nor, in order to maintain the validity of this legislation, is it necessary to assert that Congress may exercise a purely arbitrary discretion in the matter. If by arbitrary discretion is meant a discretion, under like conditions, to discriminate without reason in favor of some as against other classes of our people, or in favor of some as against other legitimate avocations, it may be conceded that such legislation would be invalid, within the principles announced in ex-parte Garland (4 Wallace, p. 333; *Dent* v. *West Virginia* (*supra*); *Yick Ho.* v. *Hopkins* (*supra*). But if by denying the right to exercise an arbitrary discretion, it is meant to assert that Congress, in exercising any power of legislation has not the right, and is not under obligation to so exercise that power as not incidentally to aid in the commission of wrong, either to the public or to individuals, then the proposition is utterly denied.

In other words, my proposition is simply this. The United States Government, like an individual or a private

corporation, or an ordinary municipal corporation is subject to the great rule which pervades all well ordered society, that no one shall so use his own property, franchises, or powers, as that, in so doing, he shall inflict a needless injury upon the property or personal rights of individuals, or upon the well being of society. Thus Congress has the undoubted right to improve the Potomac or Mississippi River for purposes of navigation. It has not, I suppose, the right to levee either of these rivers for the purpose simply of protecting the adjacent lands of individuals from floods; nor to ditch and drain adjacent marshes, in a State, in order to improve the health of the neighborhood. But if, in making the improvements for the purposes of navigation it results that the water is more liable to be thrown out upon the adjacent lands, thereby to injure or render such lands worthless for agricultural purposes, or to render the neighborhood unhealthy and unfit for habitation, then Congress has not only the power, but is under a moral obligation, by levees or otherwise to protect these lands against such incidental effect of its work in improving those rivers for navigation.

So Congress has the undoubted power, if in its judgment the public health requires it, to prohibit the passage of the mails between a district affected with an epidemic disease and the rest of the country. That is, it must so exercise this power of carrying the mails as not to needlessly endanger the health of the people of other communities.

I suppose no one would deny the right or the obligation resting upon a transportation company to refuse to

carry goods or persons under such circumstances, notwithstanding its obligations as a common carrier. Is the power of the Government to carry the mails more imperative, or its obligation to preserve the public health less imperative than that of a common carrier? Who is to judge of the necessity for such suspension of the carriage of the mails? It may be that the petitioners' counsel would insist that the Government could only suspend such carriage in the case of an epidemic universally conceded to be contagious; but I can not doubt that the determination of the necessity is with Congress.

So, again, Congress is authorized by the Constitution "to establish uniform laws on the subject of bankruptcy throughout the United States." In the bankrupt law of 1867 (Revised Statutes, 5117), notwithstanding the requirement of uniformity, it is provided, that—

> No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.

Is it doubted that Congress might have provided that no debt, contracted by a manager or person interested in and growing out of the transactions of a lottery or a "bucket shop," should be discharged in bankruptcy? Yet, to have so provided would have been "disfavoring" the lottery or grain gambling business, and doing what Congress would have no power to do directly in one of the States.

So Congress is authorized to establish an uniform rule of naturalization. Is it doubted that Congress might not only refuse naturalization, but even exclude from the country altogether persons coming here with the declared

purpose of establishing and maintaining a gambling house, like those at the great resorts in Europe, or even such philanthropic institutions as the Louisiana lottery?

So it is well-known that prize-fighting is a profession by which men obtain their livelihood. Is it doubted that Congress might exclude from the country persons who come here from a foreign country avowedly for the purpose of carrying on that business? Is Congress powerless to disfavor in the mails the "green goods business" because not a crime at common law?

Congress is authorized to regulate commerce with foreign nations. In so regulating may it not exclude entirely any article of commerce known to be of use only for gambling purposes? And yet gambling is not understood to be *malum in se*, or under the condemnation of universal public sentiment.

So, under the power to regulate commerce with the Indian tribes, it has been held by this court (*United States* v. *Holliday*, 3 Wall., 407), that Congress may forbid the sale of intoxicants to individual Indians within a State and not upon a reservation, and thereby "disfavor" the manufacture of such intoxicants, although it would be powerless directly to legislate against such manufacture. The principles announced in this Holliday case seem to me very pertinent to this discussion.

So Congress has power to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their inventions and discoveries. Who is to determine what constitutes science and what constitute useful arts, and what inventions and what books are within the scope of this

provision? It is, at least, safe to say that Congress may refuse to authorize a patent for any invention or a copyright for any book, the tendency or effect of which upon the public morals would be even questionable. Within such limits, at least, it is safe to say the courts would have no power of reviewing the discretion of the legislature.

Suppose, as is now an early probability, a postal telegraph should be established, is it true that the United States Government would be under obligation to transmit over its telegraph lines messages in reference to all business or practices not indictable at common law or not known to the law books as *mala in se?* Could it not refuse to transmit telegrams baldly relating to gambling transactions, trading upon margins in wheat or stocks, or negotiating the purchase and sale of lottery tickets? Or, in regard to any other business which, in the exercise of a sound discretion, Congress might declare to be *contra bonos mores?*

I submit that no judicial decision has been cited, and it is my belief that none can be found, denying to Congress the power with reference to the mails for which we are contending.

In what has been said, no reference has been made to the fact that the seat of government, and the headquarters of all its postal operations, the center from which is distributed a large part of the mails, is within a district in regard to which Congress has every power vested in a State legislature, as well as those which belong to it as the Federal Congress.

Nor has the further fact been referred to that the postal system embraces not only the States but all the Territories

which are subject to the supreme legislation of Congress. And, yet, the contention of the petitioners is, that, by reason of the fact that the legislature of Louisiana has chartered their corporation, it has a right to the use of the mails, not only in Louisiana, but in all the other States and Territories and the District of Columbia.

V.

The second main proposition of the brief of Mr. Carter is that the lottery statute is unconstitutional because it is a law abridging the freedom of the press, and is, therefore, at variance with the first amendment of the Constitution. That amendment reads as follows:

> ARTICLE 1. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

I shall not follow the learned counsel in his very elaborate and protracted discussion of the contest for the freedom of the press. If the history of the law of libel, whether civil or criminal, has any relation to the question under discussion here, it seems to me to be so remote as to be of unappreciable value.

I am quite willing to accept Hamilton's definition of freedom of the press, quoted on page 69 of the brief under review, as follows:

> The liberty of the press consists in the right to publish with impunity truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals.

I am quite willing, also, to admit Hamilton's third proposition.

I must beg leave, however, to doubt whether Alexander Hamilton supposed, in formulating these statements, that he was asserting an obligation, on the part of the United States, to circulate advertisements of an institution which, in the language of this court, expressed through Mr. Justice Grier in *Phalen* vs. *Virginia*, "is a nuisance," "injurious to public morality," "a widespread pestilence that infests the whole community, preys upon the hard earnings of the poor, and plunders the ignorant and simple."

Of course, however, it is not necessary to discuss the question whether the publication of such advertisements is a nuisance and subject to legislative abatement.

Should a case presenting that question arise, it would be pertinent to inquire whether "freedom of the press" in the first amendment imports absolute license; or whether, like the right to "keep and bear arms," in the second amendment, it is subject to reasonable regulation.

But the question here is simply the question of the obligation or non-obligation of the Government to become the agent of such lottery by circulating the advertisements. In short, it is the same question we have been discussing all along. And so counsel for petitioner practically confesses on page 83 of his brief, where he comes back to his attempted distinction between publications *malum in se* and *malum prohibitum;* admits the right of Congress to exclude the former from the mails, notwithstanding the Constitutional inhibition against a law abridging the freedom of the press. Upon his ability to

maintain that distinction, and the consequent impotency of Congress to exclude from the mails anything not recognized at common law as *malum in se*, depends his entire argument in support of his second as well as his first proposition. And, without taking more time with argument or illustration of that point, I beg to call the attention of the court to the act of September 26, 1888 (25 Statutes at Large, p. 496). If the position of counsel is correct, then that entire act is void, because it clearly established a censorship upon what is to go in the mails. It is clearly by that act made the duty of the post-office officials to exclude the matter named in the act from the mails. Can any good reason be given why a postmaster, or even the Postmaster-General, is better qualified to pass upon and exclude from the mails matter *malum in se* than other matter *malum prohibitum*. Indeed it is a remarkable circumstance that in this brief, running through ninety-two pages, not a single judicial decision is cited or referred to in which any court has made, or even suggested, a limitation upon legislative power dependent upon this distinction.

But not only is this act of September 26, 1888, objectionable according to petitioner's theory, as establishing a censorship, but certainly a large part of section 3 would be incurably vicious because the matters there put under the ban were not at common law, and are not in public estimation *mala in se*. Counsel for petitioners will hardly claim that at common law, or in the present public estimation, the sending of a postal card or open communication containing words "of a threatening character, or calculated by the terms or manner or style of display and obviously

intended to reflect injuriously upon the character or conduct of another," was or is *malum in se*, and therefore that provision of the law would have to go out, and according to the petitioners the whole law would be invalid. As a matter of fact a good many people have been tried, sentenced, and punished, and are now being punished under that very clause, and all for the improvement of the good order of society.

But, as already stated, the real issue is whether the United States Government is compelled to become the agent of this lottery company. Mark, the position of counsel for petitioner (brief, p. 25) is that the Government is *bound* by the grant in the Constitution to "establish and maintain post-offices, etc.," to furnish to the people mail facilities as of right and without any discretion in the premises. With all deference I submit that the first amendment to the Constitution no more requires Congress to provide for the carrying of the literature of this lottery company in the mails than it requires Congress to provide by law for printing such literature. Printing is no less essential to the freedom of the press than circulating or publishing, therefore the Government, especially as it has a vast printing establishment, ought to print circulars for the Louisiana Lottery Company. So it ought to furnish halls in which men may exercise the right of "free speech." It is very essential to free speech that those who speak shall have a fitting place for speech making; and it certainly would be very convenient if the Government were to furnish halls or buildings which should be open to every man who wants to make a speech. The speech is of no account unless somebody hears it, and people will not go to hear

speeches unless convenient places or opportunities are furnished, therefore it is the duty of Congress to provide by law such places. The very least that can be done, certainly where the Government has public buildings and court rooms, is to open them for the use of the people. Not to do so is abridging the freedom of speech, just as a failure to transmit newspapers in the mails is abridging the freedom of the press. Indeed, applying the same logic to the same amendment of the Constitution, it would seem to be the duty of the Government to provide churches for the free exercise of religion, and that it should provide the people which convenient places for their assemblage to petition for the redress of their grievances.

Seriously, is it not too plain for argument that, under this first amendment to the Constitution, Congress does its whole duty by the press when it fails to put any restriction whatever upon the printing, publication, or circulation thereof by those interested therein, through such private agencies as they are able to command? Why, upon the theory of the argument of the petitioners that the publishers of newspapers have an absolute right to carriage in the mails, and that any discrimination against them is abridging the freedom of the press, then all the postal regulations by which letters are given precedence over newspapers in the mails, even in time of carriage and distribution, are invalid. This is certainly a discrimination against the newspapers. It is abridging the freedom of the press. A newspaper published to-day is practically valueless to-morrow, while letters may often wait a day without loss, therefore the precedence provided for in the regulations, and very common in the trans-

portation and delivery of letters over newspapers, is an intolerable violation of the first amendment of the Constitution, and calls for immediate redress.

Without further discussion, it is submitted that no question under the first amendment of the Constitution is in issue in this case, nor can be in issue, so far as the Louisiana lottery is concerned, until a statute shall be passed forbidding, not merely the circulation of papers carrying its advertisements through the mails, but forbidding the circulation of such newspapers through any agency whatsoever Whether it would be entirely competent for Congress, under the power to regulate interstate commerce, in the light of the principles announced in U. S. *vs.* Holliday (*supra*) to prohibit absolutely the sale or transportation of tickets of the Louisiana lottery outside of the State of Louisiana is an interesting, but at present purely speculative, question.

VI.

Finally, it seems to me that the question petitioner's counsel assume to be in the case is not so broad as is claimed. Each of the petitioners is seeking discharge from arrest, under indictment or information, for illegally depositing unmailable matter in the mails. Whether the law by its terms authorizes the postal officials to throw out matter deemed to be unmailable, and whether it is competent for Congress to authorize such action by the post-office officials, are questions not involved in any of these cases. Nor does it seem to me that they are cases in which, if the law were found to be invalid in that particular, it would necessarily be invalid under the decisions

of this court in its entirety. My understanding is that the decisions, not only of this court, but generally, hold only that where a number of acts are designated in the statute as constituting a particular crime, and as to some of such acts the legislation is unauthorized, the courts can not be required to select out such acts as are within the authority of the legislature and enforce the law as to them, rejecting it as to the others.

I think no decision will be found wherein it is held that if an act defines different offenses and provides for their punishment, the fact that as to one of the offences the legislation was unauthorized renders the entire legislation invalid. And so if the act defines and prescribes a punishment for an offense, the fact that it also, independently of such provision, imposes duties on officers which are unauthorized by the Constitution is immaterial. If I am correct in this discrimination, then the provision for the punishment of mailing unmailable matter is in no way dependent upon those prescribing duties of post-office officials in relation to such matters, but each may stand or fall independently of the other.

It is proper for me to say that this brief is intended to be supplemental to the brief of Mr. Assistant Attorney-General Maury, and not a complete presentation of all the phases of the case.

W. H. H. MILLER,
Attorney-General.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 7, ORIGINAL. EX PARTE JOHN L. RAPIER.

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ADDITIONAL BRIEF OF ASSISTANT ATTORNEY-GENERAL MAURY.

WM. A. MAURY,
Assistant Attorney-General.

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The circumstances under which the brief of the undersigned, filed at the last term, was prepared, and which are referred to in the brief, were so unfavorable to anything like a complete discussion of the questions raised in these cases that it is to be hoped no apology is necessary for this additional brief.

The concession of the other side that Congress has a liberal choice of ways and means in executing a constitutional power was of course unavoidable.

But the deferential reference which is made to the doctrine of *McCulloch* v. *Maryland* by counsel opposite wears the appearance, very much, of a blind for the rep-

etition of the identical argument that was overthrown by the great judgment in that case, namely, that in executing a granted power Congress is limited to such means as are indispensably necessary for that purpose.

Applying now the liberal doctrine of *McCulloch* v. *Maryland*, as to implied powers, to the case at bar, it is manifest that under the power "to establish post-offices and post-roads" Congress is authorized to *create* and maintain a mail service upon any plan it may see fit. From the generality of the power the character of the service to be established is necessarily left to the discretion of Congress, for, as this court said in the *Legal Tender Cases* (12 Wall., 457, 546), "the whole system of the transportation of the mails is built upon the power to establish post-offices and post-roads."

Congress has created a mail service, one of the features of which is a provision making it penal to put into the mails, for transmission, any newspaper containing an advertisement of any lottery. This provision, it is contended, is "not necessary and proper" for carrying out the power to establish a mail service.

It is conceded, however, that Congress can properly exclude from the mails matter connected with the perpetration of crimes of the darkest dye, *mala in se*, but it is said that as lotteries do not belong to that denomination of crime, being merely *mala prohibita*, the law excluding lottery advertisements is arbitrary and unconstitutional.

It is not denied that lotteries are hurtful, but the contention seems to be that they are *not hurtful enough* to warrant the legislation complained of.

The ground on which the concession is made that Congress has power to exclude from the mails matter relating to crimes called *mala in se* is that there inheres in the very idea of government the power to repel any attempt to make it instrumental to offenses of such magnitude.

But, it is said, *there the power stops*, and stops too at the very point where the mischievous use of the mails *begins*, leaving the Government mail service the helpless instrument of every knave who wants to float a fraudulent scheme to tempt the cupidity and credulity of the masses.

If there inheres in the very nature of government the duty to repel attempts to make it an agency of crime of the darkest dye, why does there not inhere in the power "to establish post-offices and post-roads" a like duty to keep the mail service free from *all* crime?

To say that an implied power to purge the mails of lottery advertisements is not "necessary and proper," that it is not, in other words, a means conducive to the end of making effective the power to establish a mail service, is nothing more than to repeat the exploded argument that such a power is not *indispensably* necessary, is simply to magnify the sense of "*necessary*," as employed in the final clause of section 8 of the first article of the Constitution, is to ignore the meaning of the accompanying attributive "*proper*," and to lose sight of the fact that, as Chief Justice Marshall said in *McCulloch* v. *Maryland*, a thing that is "*convenient*" for executing a power is also "necessary and proper" in the sense of the Constitution.

The fiscal operations of the United States might have been carried on without the creation of a bank by Con-

gress, as years of experience have shown, but because those operations could not, perhaps, have been carried on so *conveniently* without a bank as with one, this court held that a bank was "necessary and proper" for that purpose. And in *Hepburn* v. *Griswold* (8 Wall., 615) Chief Justice Chase used the following language, which is cited by the late Mr. Justice Miller with approbation, in his Lectures on the Constitution, p. 143, namely:

> It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws calculated to effect objects intrusted to the Government.

The mails may be carried through the several States without a law making it penal to introduce into them lottery advertisements, but is it not manifest that a law of that character is more than *convenient*, nay, that it is *necessary*, in order to prevent this agency of the Federal Government from becoming a constant menace and source of irritation to the States? all of which, it is believed, prohibit lotteries under penalties more or less severe except Louisiana. Is it not, indeed, *indispensably necessary* to the harmony of our Federal system and to the promotion of the "general welfare," which was one of the great designs of that system, that Congress should so regulate the mail service that it shall not be used as a means for carrying on the lottery business in violation of the laws of the several States?

To think of the Government of the United States

throwing the ægis of its protection over men engaged in a business which is made criminal from one end of the country to the other! A business which the State of Louisiana itself has, from time to time, denounced as a crime and punished with severity, at one time making it the "duty of the presiding judge of every court of criminal jurisdiction in this State especially to charge every grand jury to inquire into all violations of the laws against lotteries, and against the unlawful selling of tickets in lotteries," and giving the attorney-general of the State and the several district attorneys who might prosecute for offenses under the lottery laws the right to retain 20 per cent. "out of any amount recovered by them" (Rev. Stat., 1856, pp. 148, 149), and, at another time, abolishing the Louisiana Lottery Company, and again making it highly penal to maintain or promote a lottery, or to sell, barter, exchange, give, or otherwise dispose of lottery tickets (Acts of 1879, No. 44, pp. 5–7). Indeed, the constitution of the State now in force (Art. 172) declares "gambling" to be a "*vice*."

Congress may, under the power to regulate commerce with foreign nations, prevent paupers and vagrants and criminals from coming into the States from abroad (*Henderson* v. *Mayor of New York, etc.*, 92 U. S., 259,272–'3; *Chy Lung* v. *Freeman, ibid.*, 275, 280); but, it is argued, Congress has no power to prevent its creature, the mail service, from being used to corrupt the morals of the people of these same States. In other words, Congress can keep the channels of commerce clean, but not those of the mail, although the mail is its creature and commerce is not.

That such a power must exist, necessarily follows from the character of the power to establish a mail service. This power belongs to that class of powers which, from their nature, admit of no coördinate existence in the State governments, such as the power to regulate commerce, the power to declare war, the powers to establish uniform rules of naturalization and on the subject of bankruptcies, which are as completely removed from the domain of State power as though the Constitution had expressly prohibited their exercise by the States.

The power to establish and regulate a mail service being thus exclusively vested in the National Government, and taken completely out of the hands of the States, it would seem to follow, from the argument on the other side against the constitutionality of the law in question, that there resides *no power anywhere to protect the people of the several States from the introduction of lotteries through the mails.* In a word, we have a failure of government in this respect which nothing but an amendment of the Constitution can cure.

Is it probable that the framers of the Constitution intended to make the power to establish a mail service so limited as to produce the failure of government indicated? They knew that the effect of the power to establish a mail service would be to invest the Federal Government with exclusive control over that service, and that unless the power so vested carried with it a plenary police authority it might be a source of danger and demoralization to the people of the several States.

Imagine the predicament of the several States *if there were*

no power anywhere to prevent the importation of liquor into a State, and you will have an adequate idea of their situation with reference to lotteries, if the argument on which the discharge of the petitioners is asked should prevail.

It would be no compliment to the great men who framed the Constitution to say that they left the provision for a postal service imperfect in so vital a particular.

But how can it be held that a statute for the purpose of purging the mail service of advertising matter relating to what this court has called "the *widespread pestilence of lotteries*" (8 How., 163, 168) is not "necessary and proper" as part of the legislation for carrying out the power to establish a mail service?

It is incomprehensible how a government created for the promotion of the general welfare can be turned into an agency for the destruction of that welfare. He is no sound expounder of the Constitution who interprets it in a way to subvert one of its leading purposes.

But it is said that if Congress may exclude lottery matter from the mails it may improperly exclude other matter on the pretext of immorality, in other words, that Congress may *abuse its power*, for it comes to just that.

If the learned counsel had read a little further in the case of *McCulloch* v. *Maryland* he would have found that the Chief Justice meets that very case in his opinion. His words are:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not pro-

hibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. (4 Wheat., 423.)

Like the police power of the States, the police power of the United States over the mail service may be abused, but in all such cases the courts readily apply the corrective.

Cases will arise, from time to time, in which it may be doubtful whether Congress has the power to exclude certain matter from the mails or not. As one of the learned counsel has pointed out, it was a grave question there, some years ago, whether a proposed law excluding from the mails publications "*touching* the subject of slavery" would be constitutional, and Mr. Webster, Mr. Clay, and others thought it would not, because of its *vagueness;* but are we, therefore, to rush to the conclusion that newspapers containing lottery advertisements, which are specially and not vaguely designated in the law, can not be lawfully excluded?

Treason, "the highest civil crime which (considered as a member of the community) any man can possibly commit," is left out of the list of crimes to which counsel say the mails may be properly denied. *This omission of high treason could not have been accidental.* It had a motive, no doubt. Was it that counsel thought that a power to deny the mails to traitors might lead to a political censorship and an invasion of the liberty of the press, and that it is the *lesser evil* that the mails should be thrown open to persons attempting the life of the nation?

Suppose the Mormon propaganda were to become so

menacing to public morality as to cause Congress to deny the mails to publications advocating polygamy, will it be denied that such a law would be upheld, although polygamy, like the lottery, has the sanction of the Bible, and therefore must be only *malum prohibitum*?

It is admitted that obscene pictures may be excluded from the mails; but do they offend public decency more than publications advocating polygamy?

It seems to be supposed that the argument is advanced by invoking the well-settled doctrine that a State can not, under the pretense of exercising its police power, accomplish by indirection what it could not do directly; in a word, that a State can not, under the guise of regulating a profession or calling, enact a bill of attainder or an *ex post facto* law. But we deny the application of that doctrine to this case. We deny also that there is anything in section 3894 to show that it was passed for the purpose of suppressing lotteries, and not with the *bona fide* intent to keep lottery matter out of the mails.

But, if the power to pass the law excluding lottery matter be once conceded, it makes no difference what particular motive impelled Congress to enact it. This is conclusively settled by the case of *Veazie Bank* v. *Fenno* (8 Wall., 533), where this court upheld a law imposing a tax of 10 per cent. on the circulating notes of any person, State bank, or State banking association, although it was conceded that the object of the law was not to raise revenue, but to foster and protect the paper circulation provided by Congress, by driving out of use the circulations taxed. This case was afterwards distinctly affirmed in *National Bank* v. *United States* (101 U. S. R. 1).

Certainly it would have been more satisfactory if the learned counsel had deemed it of sufficient moment to point out what language in the law he supposed tended to show that it was not passed in good faith. This he might properly have done in support of his request that this court will perform the delicate task of scrutinizing the motives of the legislative department in passing the law.

Nobody contends that the power to regulate the mail service may be *abused* as well as used; that Congress may, under the pretense of exercising this power, make discriminations hurtful to legitimate business. The courts would instantly correct such excesses. But suppose the discrimination complained of be against a business that is destructive of morality, is it not a lawful discrimination, which the courts must uphold?

When the legislature of Mississippi repealed the charter which it had given to a lottery company, this court was asked to declare the repealing law unconstitutional on the ground that it impaired the obligation of a contract between the State and the lottery company. It was contended in that case, as in this, that the police power of the State could not reach such a contract, because a lottery was not wrong or immoral in itself, as was evidenced by the fact that lotteries had received the countenance of the purest and best men. This argument was pressed with great earnestness, ability, and, we may add, confidence by eminent counsel, but without avail. (*Stone* v. *Mississippi*, 101 U. S., 814; see also *Beer Co.* v. *Massachusetts*, 97 U.S., 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 65, and *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S., 746.)

Where, then, a regulation of the mail service is to keep that service undefiled by immoral matter, it will be upheld by the courts. Vice and immorality can not take shelter behind the defenses erected for the protection of liberty. It is in vain to invoke the sanctity of contracts or the inviolability of privileges or immunities when the invocation comes from that direction.

The most extreme positions are taken by the counsel opposite, such as that, if the law in question is valid, Congress may arbitrarily do this, that, and the other high-handed thing, may invent a morality of its own, may break down and build up in any direction it chooses—arguments which might be directed with quite as much force against the admitted police power of the States; arguments, in short, against a power because that power may be abused. It is to protect the people against just such excesses, whether State or Federal, we would remind the learned counsel, that the judicial department of the Government has been established.

Can he or his clients feel insecure with such a barrier between them and legislative usurpation? Can greater protection be demanded against the abuse of the police power over the mails by Congress than is afforded against the abuse of police power by the States?

Because the State of Louisiana, after denouncing and punishing the lottery as a *vice*, has determined to treat it as an evil which is rather to be regulated than extirpated, and to bring it under control by subjecting it to the licensing power and making it a source of revenue, the argument is that a *vice* thus regulated is *no longer a vice* and

can not be denied the privilege of reaching the people of the other States through the mails. In other words, because the State of Louisiana fosters this pestilence within its borders, therefore the people of that State have the right to send its contagion all over the country through the mails.

Indeed, the argument comes to this, that morality is conventional or utilitarian, and that until all men have agreed that a thing is a vice it can not be classed as *malum in se;* and great reliance is placed on some observations of Chief Justice Marshall in the case of "The Antelope" (10 Wh., 66), to the effect that the slave trade could not be an offense against the law of nations so long as some nations countenanced it, as they did at that time, and, consequently, that the visitation and capture on the high seas in time of peace of a foreign vessel with a cargo of slaves by a cruiser of the United States was unauthorized. And the learned counsel might have added that it was one of the great compromises of the Constitution that slaves might be imported until the year 1808.

But does this show that the slave trade is to be regarded *now* as it was *then?* Is the fact that the slave traffic is still carried on, an argument to show that it is not now *malum in se* under the Constitution of the United States, which declares that slavery shall not exist? As well might it be argued that piracy is only *malum prohibitum* because this Government, when just strong enough to stand alone, made treaties with and *paid tribute and ransom money* to the Mediterranean corsairs.

Some *mala prohibita* are so indifferent in their nature

that they are said to be *mala quia prohibita*, and the constant effort in this discussion is to confound lotteries with these offenses, which are such by the letter of the law only, having no appearance of wrong to the moral perception. But that moral perception must be blunt indeed that can fail to see immorality in the lottery, at this day, with its train of evils. This court has declared its immorality on more than one occasion, as we have seen. To say then that the lottery is *malum quia prohibitum* and not an evil on moral grounds also is to affect to be blind to what the rest of the world sees.

The time has come, if it can ever come, when the lottery must be classed as *malum in se*. Louisiana has, with the rest of the States, declared it to be a *vice*, and her people can not be regarded as having changed that opinion because *they have licensed it in order to control it* as a *vice*.

It may be said with truth that one of the greatest curses that afflict this country is the gambling spirit that pervades every class, and corrupts almost every branch of business.

The names of stocks and commodities are used as gamblers' counters, and a vast amount of what is called business in our great cities is sheer gambling.

But the lottery intensifies this evil manifoldly. It goes into every nook and corner in the land with its glittering and delusive temptation, impoverishing and debauching wherever it enters.

How revolting, then, is the argument that Congress is powerless to prevent the mail service from becoming the handmaid of this monstrous evil! How impossible the

conclusion that a law excluding lottery matter from the mails is not "necessary and proper" for executing the power "to establish post-offices and post-roads!"

DOES THE LAW IN QUESTION INVADE THE LIBERTY OF THE PRESS?

The result of the argument by the other side on this head is, "that if the power of excluding lottery matter from the mails could be regarded as incidental to the power of establishing post-offices and post-roads, Congress is prohibited by the First Amendment from exercising it." The particular provision of the amendment to which reference is made is that which declares that "Congress shall make no law * * * abridging the freedom of speech or of the press."

The precise question that is raised under this amendment is whether the provision of section 3894 that makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person to knowingly deposit or cause to be deposited or to knowingly send or cause to be sent "any newspaper * * * containing any advertisement of any lottery * * * or containing any list of prizes awarded at the drawings of any such lottery, * * * whether said list is of any part or of all of the drawings," is an abridgment of the freedom of the press.

No one denies that freedom of circulation is indispensable to the freedom of the press; but it is denied that the freedom of circulating newspapers means, necessarily, that the mail service shall be the channel through which such circulation shall be made.

It is to be noted that the law, in so far as in question in these cases, is not leveled at newspaper discussions of lotteries, but at newspaper advertisements of lotteries, and the novel position is taken that freedom of the press involves the *right* to give wings to advertisements of vice by the agency of the mails. We beg to say again that vice can not shelter itself behind the safeguards of liberty. They were erected for no such purpose. If the publisher of a newspaper admits into its columns lottery advertisements he has, by his own act, forfeited his right to deposit his paper in the mails, *volenti non fit injuria.*

It is admitted that the guaranty of freedom of the press can not sanctify advertisements relating to *mala in se*, but why stop there and allow it to sanctify advertisements relating to *mala prohibita?* The distinction is artificial and fanciful, and, we beg pardon for saying, absurd, when regarded from the standpoint of the public good. It is the advertisements relating to *mala prohibita* that infest the mails and that are mischievous to the public, for we know that men engaged in the commission of such crimes as murder, arson, and larceny do not go into the newspapers with their nefarious schemes.

But it is said that, if Congress may exclude from the mails newspapers containing lottery advertisements, it may also exclude newspapers containing "matter advocating the tariff or free trade, or the doctrines or the candidates of a particular party." But, as we have already shown, the argument that a power may be abused is no valid argument against its existence. The power to tax is without limit; may it, therefore, be argued

that the power does not exist because it may be abused? If such an argument were valid it would strike down all governments. No implied power could possibly stand against it.

The guaranties of freedom of speech and the right "to keep and bear arms" are not considered to be "abridged" or "infringed" by reasonable regulations protecting the community against their abuse, and it seems to us quite as reasonable that a man should complain of violation of a constitutional right because not allowed to interrupt a meeting for public worship by an obtrusive harangue, or to carry concealed weapons, or to keep in his house for private use more than a prescribed quantity of gunpowder, as that a newspaper-publisher should complain that a law excluding from the mails newspapers containing lottery advertisements abridges the freedom of the press.

The mistake is in supposing that a restriction upon the unreasonable use of a guaranteed right is an abridgment or curtailment or infringement of such right. Such a restriction is a part of that law of liberty or freedom which distinguishes it from *license*.

We have already in a former brief noticed the argument that the right to the mails is a franchise given by the Constitution to every citizen of the United States, and consequently that the power to establish a mail service belongs to the class of powers which Congress *must* exercise. This contention is, as we have shown, destitute of foundation.

So far from there being an indefeasible right to send newspapers of any kind through the mails, we maintain

that Congress has the right to say what shall be carried in them. If Congress believes that the immense weight and volume of the newspaper matter that is deposited in the mails obstruct and encumber them, we doubt not that it may exclude such matter altogether.

To argue that to deny the mails to newspapers is to abridge the freedom of the press, is to ignore the fact that the press has now *in its own service*, in various parts of the country, by permission of Congress (see § 3888 R. S.), trains for the transportation of newspapers which are faster than those that carry the mails. Indeed, the time seems rapidly approaching when the great newspapers will almost entirely abandon the mails for the more convenient and the swifter channels of commerce.

We deny, then, that there inheres in citizenship of the United States the right to send newspapers through the mails contrary to a law of Congress forbiding it.

But it is said that section 3894 "*creates a censorship*" in that it forbids the postmaster from delivering lottery matter to the person to whom it is addressed, and thus "arrests publication," and that the law submits it to the judgment of a postmaster whether publication shall be thus arrested.

It is to be remarked with reference to this point that the petitioners in these cases are indicted, respectively, for the offense of depositing lottery matter in the mail, and it is not perceived how this particular point arises under these applications. It is true the point is made that if section 3894 is invalid in this particular it is invalid altogether, and, consequently, that the petitioners are entitled to their discharge.

But surely argument is not required here to show that a section of the Revised Statutes creating several distinct offenses by as many distinct provisions is not rendered wholly void by the unconstitutionality of one provision, which is separable from the others. (See *Presser* v. *Illinois*, 116 U. S., 252, 263, and cases cited.)

Is there anything in the argument that the law establishes a censorship?

We understand it to be conceded that the postmaster may properly decide whether he shall refuse to deliver mail matter on the ground that it relates to *malum in se* or is obscene; yet this power might he perverted to curb the freedom of the press; how then does it happen that the power is properly reposed in the postmaster as to *one kind of criminal matter and not as to all?* If the power is not a censorship as to *murder*, why is it such as to the *lottery*, if liability to abuse is the test?

If there is a power in Congress to purge the mail of lottery advertisements there must be a power to refuse delivery of newspapers containing matter of that description.

It is abhorrent to common sense and would argue an inadequate estimate of the intolerance of our people of obtrusive and obstructive governmental interference to suppose it possible to establish at each receptacle of mail matter an espionage to protect the mail from the introduction of lottery advertisements. It is manifest, therefore, that if there is no authority to forbid delivery of newspapers containing lottery advertisements the power to purge the mails of such matter is *worthless*.

The first step in a prosecution for crime is usually the arrest of the accused. He may be innocent of the accusation, but he must submit to this summary exercise of power; at all events he must submit for the time being. It is true he may have an action, in an extreme case, against the magistrate who ordered or the person who instigated his arrest, but, generally, the suffering of innocence under accusation is *damnum absque injuria.*

Innocence, therefore, may languish for days and months in jail awaiting trial, by the simple order of an officer of the law, without the verdict of a jury; but we are told that it is a censorship of the press for a postmaster, unsupported by the verdict of a jury, to refuse to deliver a newspaper containing matter which the law says shall not be delivered. In such cases the officer acting does so under the penalties and responsibilities imposed by law. In the nature of things, he must be the judge whether a case for action is presented or not. If this were not the rule much of the legislation necessary for the protection of society would be frustrated.

It is difficult to treat with seriousness the argument that the merely ministerial power of the postmaster to withhold newspapers containing lottery advertisements is *censorial.* To refuse to deliver such newspapers for such a reason can not be censorship, because *no opinion upon or discussion* of the subject of lotteries is in any way involved. The constitutional guaranty against abridgment of the freedom of the press is for the protection of *free discussion* and does not extend to advertisements of lottery dealers soliciting business, and the mere fact that it is the Louisiana Lottery

Company, and not the great newspapers of the country, that is assailing the law in question as an invasion of the freedom of the press, has much significance.

This discussion may now be properly closed with a reference to the opinion of the eminent judge who sat in the case of *ex parte* Jackson in the United States circuit court for the southern district of New York (14 Blatchford, 245), and to the opinion of the Supreme Court of the District of Columbia in the case of Maximilian A. Dauphin *v.* David M. Key, Postmaster-General, copies of which will be furnished.

WM. A. MAURY,
Assistant Attorney-General.

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Reply to the Brief of the Attorney General.

In this addendum I desire to reply briefly to the argument recently filed by the Attorney General, but only so far as the same relates to the single question presented by the case of *Ex parte* Rapier. I shall not attempt to reply to that part of his argument which assails the contention developed by Mr. Carter in the cases against Dupre. I shall limit my reply to the defense of the single proposition upon which the case of Rapier has been rested.

The Attorney General opens his brief with this serious complaint: "As was to be expected in such a cause, the main effort of counsel for petitioners in each of the briefs seems to be to becloud the issue. To this end their entire arguments assume that the refusal of the General Government to be the instrumentality for the circulation of lottery literature is the same thing as forbidding the publication or circulation of such literature; that the only escape from a violation of the prohibition in the first amendment to the Federal Constitution against making 'a law abridging the freedom of the press' is for every official of the Post Office Department to become the servant and every carrier the errand-boy of the Louisiana Lottery Company." My counter-complaint is that, certainly so far as the case of Rapier is concerned, the Government has attempted to fly from the single clear and compact issue which that case presents, and also to ignore the real party by whom that issue is brought before the Court. If the Attorney General will only take the trouble to read the petition for the writ, he will find that it is presented—not by the Louisiana Lottery Company, but by the publisher of one of the oldest and most respectable newspapers in the United States. If he will then look through the pages of the newspaper, for the sending of which through the mails this publisher was arrested, he will find that its contents does not consist of a single lottery advertisement, but of advertisements of all kinds of commercial pursuits, commingled not only with news, but with discussions of all the leading topics of the day—social, religious, and political. In this way the counsel for the Government may

yet be brought to realize the all-important fact that it is the publisher of an American newspaper and not the Louisiana Lottery Company who is demanding the right, under the law of the land, to have every official of the Post Office Department become his servant, and every carrier his errand-boy. When that point is reached it may then become possible to attract the attention of the Government to the further fact that this publisher denies the power of Congress to exclude his newspaper from the mail, by reason of its contents, for the single and conclusive reason that the first amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech or of the press." This single and compact proposition, upon which the case of Rapier is made solely to depend, is either true or false. If it be false, certainly the Government should be able to demonstrate its unsoundness by some kind of argument or by some show of authority. But the remarkable fact is that so far the counsel for the Government have attempted to fly from the discussion of this all-important proposition in every form in which it has been put. In Mr. Maury's brief the position is assumed that the freedom-of-the-press clause of the first amendment—*in a case in which the freedom of the press is the only issue*—has no special application, and this strange assumption has been followed by his chief. This piece of fine forensic strategy will, however, hardly enable the Government to escape from a question which it cannot answer. Only once before in the history of the Republic has the right of Congress to abridge the freedom of the press been made the subject of serious discussion by the jurists and statesmen of the country, and in that discussion it was admitted on every hand that the limitation contained in the first amendment was the basis upon which that freedom depended. Reference is of course made to the discussion which occurred in the Senate of the United States upon the report and accompanying bill there presented on February 4, 1836, by "the select committee to whom was referred that portion of the President's message which relates to the attempts to circulate through the mail inflammatory appeals to excite the slaves to insurrection." (For the report see Niles' Register, vol. 49, p. 408.) As to those parts of the report which related to the general nature

of the Government and to the then existence of a danger of the abolition of slavery in the slave States through interference from other States, there was certainly a wide difference of opinion. But as to the constitutional question involved in the restraint imposed by the first amendment upon the power of Congress to regulate the mails, there seems to have been an almost unbroken consensus of opinion. (See Benton's Thirty Years' View, vol. 1, pp. 580–'88.) Although Mr. Calhoun claimed, under his peculiar theories, that the States possessed a power of regulation to which the first amendment did not apply, he set forth with great clearness and force in the report which he drew that so far as the power of Congress to regulate the mails was concerned the binding force of the amendment was perfect and absolute. The report says that "the principle on which the sedition act was condemned as unconstitutional was a general one and not limited in its application to that act. It withdraws from Congress all right of interference with the press in any form or shape whatever, and the sedition law was put down as unconstitutional, not because it prohibited publications against the Government, but because it interfered at all with the press. The prohibition of any publication *on the ground of its being immoral, irreligious, or intended to excite rebellion or insurrection* would have been equally unconstitutional, and, from parity of reason, the suppression of their circulation through the mail would have been no less so." It was asserted with equal force at the same time by those who inclined most decidedly to a strong National Government that the freedom-of-the-press clause of the first amendment deprived Congress of the power to interfere with the circulation of newspapers through the mail by any process which involved the consideration either by Congress itself or by executive officers of the Government of *the character of their contents*. My main purpose now is to draw the attention of the Court specially to the views expressed by Mr. Webster on that subject when the bill, which accompanied the report, became the subject of debate in the Senate. The following is the account of Mr. Webster's speech contained in Benton's Thirty Years' View, vol. 1, p. 586: "Mr. Webster addressed the Senate at length in opposition to the bill, commencing his argument against what he contended was its vagueness and obscurity

in not sufficiently defining what were the publications the circulation of which it intended to prohibit. The bill provided that it should not be lawful for any deputy postmaster in any State, Territory, or district of the United States knowingly to deliver to any person whatever any phamphlet, newspaper, handbill or other printed paper or pictorial representation touching the subject of slavery, where by the laws of the said State, district, or Territory their circulation was prohibited. Under this provision Mr. Webster contended that it was impossible to say what publications might not be prohibited from circulation. No matter what was the publication, whether for or against slavey, if it touched the subject in any shape or form it would fall under the prohibition. Even the Constitution of the United States might be prohibited, and the person who was clothed with the power to judge this delicate matter was one of the deputy postmasters, who, nothwithstanding the difficulties with which he was encompassed in coming to a correct decision, must decide correctly under pain of being removed from office. It would be necessary also, he said, for the deputy postmasters referred to in the bill to make themselves acquainted with all the various laws passed by the States touching the subject of slavery and to decide on them, no matter how variant they might be from each other. *Mr. Webster also contended that the bill conflicted with that provision in the Constitution which prohibited Congress from passing any law to abridge the freedom of speech or of the press. What was the liberty of the press? he asked. It was the liberty of printing, as well as the liberty of publishing, in all the ordinary modes of publication;* AND WAS NOT THE CIRCULATION OF PAPERS THROUGH THE MAILS AN ORDINARY MODE OF PUBLICATION? He was afraid that they were in some danger of taking a step in this matter that they might hereafter have cause to regret by its being contended that whatever in this bill applies to publications touching slavery applies to other publications that the States might think proper to prohibit; and Congress might, under this example, be called upon to pass laws *to suppress the circulation of political, religious, or any other description of publication which produced excitement in the States.* Was this bill in accordance with the general force and temper of the Constitution and its amendments? It was not in

accordance with that provision of the instrument under which the freedom of speech and of the press was secured. Whatever laws the State Legislatures might pass on the subject, Congress was restrained from legislating in any manner whatever with regard to the press. *It would be admitted that if a newspaper came directed to him he had a property in it; and how could any man, then, take that property and burn it without* DUE FORM OF LAW? *and he did not know how this newspaper could be pronounced* AN UNLAWFUL PUBLICATION *and having no property in it without* A LEGAL TRIAL. Mr. Webster argued against the right to examine into the nature of publications sent to the post office, and said that the right of an individual in his papers was secured to him in every free country in the world. In England it was expressly provided that the papers of the subject shall be free from all unreasonable searches and seizures—language, he said, to be found in our Constitution. This principle established in England, so essential to liberty, had been followed out in France, where the right of printing and publishing was secured in the fullest extent, *the individual publishing being amenable to the laws for what he published, and every man printed and published what he pleased at his peril.* Mr. Webster went on at some length to show that the bill was contrary to that provision of the Constitution which prohibits Congress to pass any law abridging the freedom of speech or of the press."

Montesquieu has said that Tacitus had the power to condense everything because he knew everything. By reason of the vastness and accuracy of his knowledge of our constitutional system, in both its English and American form, Mr. Webster was more able than any of his contemporaries to take any branch of the subject and exhaust it within a narrow compass. Within the meagre limits of the speech just set forth the great expounder has defined every material principle touching the freedom of the press which exists either in English or American law. His central proposition is that the power of Congress to regulate the mails cannot be so exercised as to abridge *in any manner* the freedom of the press as defined and protected by the first amendment. He then proceeds to ascertain what the character and scope of that freedom is. His conclusions are (1) that its very essence is the right of newspapers to circulate through the mail,

because that is the usual and "*ordinary mode*" of circulation. "What was the liberty of the press?" he asked. "It was the liberty of printing, as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" (2) that it is beyond the power of Congress to deny the right of any publication to circulate through the mail *by reason of its contents*, because he says if the power of exclusion on that ground is admitted to exist at all, no limit can be set to its application. "Congress might, under this example, be called upon to pass laws to suppress the circulation of political, religious, *or any other description of publications which produced excitement in the States;*" (3) that whether the contents of any publication is unlawful or not is purely a judicial question, upon which Congress cannot pass. "He did not know how this newspaper could be pronounced *an unlawful publication without a legal trial;*" (4) that "it would be admitted that if a newspaper came directed to him he had a property in it; and how could any man, then, take that property and burn it without *due form of law?*" (5) that every man who circulates a newspaper through the mail is only amenable to the law of criminal libel if its contents shall, after a judicial trial, be ascertained to be criminal, "the individual publishing being amenable to the laws for what he published, and every man printed and published what he pleased at his peril." Could any more emphatic expression ever be given to the four cardinal propositions upon which the argument in this case has been rested?—(1) that the very essence of the freedom of the press guaranteed by the first amendment is the right of newspapers to circulate through the public highway of the mail free from all congressional interference whatsoever, so far as their contents is concerned; (2) that the only restraint which can be imposed upon the character of their contents is the judicial restraint embodied in the law of criminal libel; (3) that the enforcement of that law belongs to the courts alone; (4) that any attempt upon the part of Congress *to adjudge* whether a given publication is lawful or unlawful by reason of its contents is a bald usurpation of judicial power. Perhaps if the counsel for the Government will peruse Mr. Webster's great speech they may yet be induced to perceive

that the freedom-of-the-press clause of the first amendment bears some relation to this argument.

In this connection I desire, with all possible deference and respect, to call the attention of the Court to a mere passing remark concerning the freedom of the press, which occurs in its opinion in the case of *Ex parte* Jackson—a remark which has been seized upon as an index to a conclusion which certainly could never have been intended. When that part of the opinion which relates to the freedom of the press is carefully examined, nothing can be more obvious than the fact that the Court, in its expressions upon that subject, was simply striving to preserve from prejudice a right which could not have been made the subject of direct adjudication, for the simple reason that it was not before the Court. In the part of the opinion referred to this expression occurs: "Nor can any regulations be enforced against the transportation of printed matter in the mails, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value. *If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress.*" This final clause has been seized upon as an intimation that Congress might exclude newspapers from the mail *without abridging the freedom of the press*, provided it does not attempt to forbid their circulation in any other manner. This idea is strengthened by a further intimation, which occurs at a later stage of the opinion. After referring briefly to the views as to the freedom of the press, which were expressed in the senatorial debate of 1836, of which Mr. Webster's speech was a part, this Court has said:

"Great reliance is placed by petitioner upon these views, coming as they did in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and of course it would

follow that, if with such a prohibition the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation *in other ways as merchandise* of matter which it excludes from the mails." These purely speculative comments as to the character of a right not before the Court have been seized upon by the Government as a positive adjudication that it is no abridgment of the freedom of the press to exclude newspapers from the mail, provided Congress does not attempt to prohibit their conveyance "in other ways as merchandise." Mr. Maury (p. 16) says: "If Congress should find that the introduction of newspapers into the mails increased the weight and bulk of the latter too much, we think Congress could exclude them and leave them to be circulated through the channels of commerce." The Attorney General (p. 19), advancing a step further, tells us that "Congress is authorized to regulate commerce with foreign nations. In so regulating, may it not exclude entirely any article of commerce known to be of use only for gambling purposes?" So, upon the basis of the *obiter dictum* contained in *Ex parte* Jackson, the Government has built up this fabric of folly out of the airy notions that newspapers have no more rights in the mail than merchandise, and that even when they are transported as merchandise through the channels of commerce, that Congress may even there exclude them if it appears that they are being used "only for gambling purposes." Without pausing to answer such strange suggestions as these, I desire to submit to the Court that, after a most careful examination of Mr. Calhoun's report, and of all that survives of the debate that followed it, I can find nothing that gives color to the idea that the jurists and statesmen of 1836 reached the conclusions which they expressed as to the freedom of the press by reason of the erroneous "assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail." As to the meaning of the illustration used by Mr. Calhoun, and quoted by the Court, touching the power of Congress to forbid the transportation of newspapers over postal routes

by means other than the mail, there should be no difficulty when the paragraph in which it occurs is taken as a whole. The point of his illustration was that if the power was ever conceded to Congress to exclude newspapers from the mail, the next step would be an attempt upon the part of Congress to forbid their transportation, outside of the mail, over any route which that body might see fit to declare a postal route. He was simply stating an extreme case in order the more emphatically to deny, as he did, the power of Congress to interfere with the circulation of newspapers *in either manner*. Mr. Webster's speech, printed above, puts it beyond all question that his denial of the power of Congress to exclude newspapers from the mail was *absolutely unqualified* by any reference to the power of that body to forbid their transportation in any other manner. He tells us that the essence of the freedom of the press consists of "the liberty of publishing in all the ordinary modes of publication; and was not the circulation of papers through the mails *an ordinary mode of publication?*" But, even if it could be demonstrated that the jurists and statesmen of 1836 were wrong in their views as to the power of Congress to prohibit the transportation of newspapers over post roads by means other than the mail, would that be any reason why this Court should now fall into the far more grievous error involved in the idea that Congress may prohibit their circulation through the mail *without abridging the freedom of the press*, provided it does not forbid their transportation through the channels of commerce as merchandise. Upon what constitutional theory can such a distinction be maintained? How is it possible that the freedom-of-the-press clause of the first amendment should guarantee to newspapers the right to circulate through channels which they do not travel, and by extraordinary means of transportation which they cannot employ, and yet fail to guarantee to them the same right over the one ordinary and usual route over which they have passed without molestation from the foundation of the Government until the present time? There are but two clauses of the Constitution under which it has ever been claimed that Congress can exercise any control whatsoever over the circulation of newspapers. Both of these clauses stand near together as subdivisions of sec. 8, art. 1, which reads as follows:

"The Congress shall have power * * *
To regulate commerce with foreign nations and among the several States and with the Indian tribes.
* * * * * * *
To establish post offices and post roads."

If anything has ever been settled in the constitutional law of this country it is that the provisions of the first ten amendments stand as constitutional limitations *upon all the Federal powers* originally granted to which they can be applied. There is no question made in *Ex parte* Jackson that the essence of the freedom of the press is the "liberty of circulating;" and it is also admitted that this liberty is fully guaranteed to newspapers by the first amendment, *so far as their right to circulate along the highways of commerce is concerned.* Upon what theory, then, can it be maintained that this limitation in favor of the freedom of the press operates upon one clause of section eight, which the framers of the amendment could hardly have had in view, and yet have no relation to the other clause only in reference to which it can have any practical efficacy.

Will this Court ever hold that the freedom-of-the-press clause of the first amendment limits the commerce clause of the Constitution, and yet that it does not limit the following clause, upon which the postal system is founded? Will this Court ever hold that so long as newspapers are permitted by Congress to be transported as merchandise through the channels of commerce—an unusual mode of transportation that is impracticable, useless, and unknown—that it is no *abridgement* ("diminution, contraction, reduction") of the freedom of the press to exclude them from the mail, the usual and ordinary mode of circulation since the foundation of the Government, and the only mode through which they can be safely and promptly conveyed to their patrons? No such solecism as this can ever be maintained until the rule is established that, in the construction of constitutions, the courts must presume that the remote, the unnatural, the extraordinary, the impracticable was intended.

It is said that in the reign of Louis XIV a publisher, who had applied to the court for leave to print a newspaper in Paris, was told that the King would be most happy for him to do so, provided he

would be careful to observe a few formal instructions, which would be given to him in writing by the minister charged with the regulation of the press censorship. In these instructions the hopeful publisher was told that he might enjoy without limit the freedom of discussion, provided he would be careful never to allude in any manner to the King, to his government, to his ministers, or to his mistresses, or to anything else that might relate to the business of the state, including both its home and foreign policy; that he should never refer in any way to the affairs of the provinces, or at any time mention the trade, finance, or art of the kingdom; that upon no account should he ever meddle with current affairs, or refer, directly or indirectly, to the history of the past. How much better will be the condition of the publisher of an American newspaper, *whose very existence depends upon its right to circulate through the mails*, when he is told by the arbitrary fiat of Congress that while he cannot use the only means of transportation that is of any practical value to him, all other means of circulation are at his unlimited and distinguished disposal. The draftsmen of the first amendment were neither dreamers nor triflers. They were earnest, practical, liberty-loving men, who had conducted a nation through the vicissitudes of a revolution, and their chief aim at its close was to make perpetual the liberties which they had achieved. Foremost among those liberties was the right to freedom of speech and of the press; that right, with all it implied, was therefore carefully defined in a formula of words that have an historic value, and placed at the head of the list in order that it might stand there for all time, not as a dead body, but as a living spirit.

Respectfully submitted,

HANNIS TAYLOR,
Counsel for Petitioner.

FILED,
NOV 12 1891
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 8, ORIGINAL.

Ex-parte GEORGE W. DUPRÉ.

No. 9, ORIGINAL.

Ex-parte GEORGE W. DUPRÉ.

Reply to the briefs of the Attorney General, and Assistant Attorney General.

JAMES C. CARTER,

Of Counsel for Petitioners.

NEW YORK:
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(Telephone, Cortlandt 1875.)

1891.

Supreme Court of the United States.

No. 8 original.	*Ex Parte* GEORGE W. DUPRE.
No. 9 original.	*Ex Parte* GEORGE W. DUPRE.

The learned Attorney-General, in a brief intended, as he says, to be supplementary to that of Mr. Maury, has done me the honor to single my brief out of the number which have been filed for the petitioners in these cases, as the one which he preferred to answer. Why he should make this selection seems not very clear. Mine certainly cannot contain that "*very astute* presentation of a bad cause," which he declares to have been made by counsel for some of the petitioners (p. 2), for he finds nothing in it which is not unsound, even ridiculously so, upon its face.

His comments upon my argument are prefaced by some not very complimentary assumptions which may fitly be resented. He not only stigmatizes the contention of the petitioners as a "bad cause" (p. 7), which he may have a right to do, whatever may be thought of the taste of such an observation, but he distinctly intimates that both the petitioners and their counsel are well aware

that such is its character, and that the latter have been moved solely by some contribution, actual or expected, out of "the revenues poured into the coffers of the Louisiana Lottery Company by its witless victims" to advocate a cause which they must know, or ought to know, is wholly destitute of merit (p. 2).

It is not indeed apprehended that imputations like these will in any degree prejudice the interests of these petitioners in the minds of any of the learned Judges of this Court; but, coming as they do from the first law officer of the government, if they should be passed without observation, it might justly be thought indicative of insensibility.

Some brief observations upon the argumentative part of this paper of the learned Attorney-General are submitted.

First.

It begins thus: "The first point in the brief of "Mr. Carter is stated as follows:

"'The power of Congress is limited in two ways. "First; it can exercise no power which has not "been conferred upon it by the Constitution. "Second; it cannot exercise the powers which "have thus been bestowed in ways and for pur- "poses which the Constitution forbids.'

"I suppose that no lawyer will question either "of these two propositions, and yet fifteen pages of "his brief are devoted to argument in support of "them" (p. 4).

Both these statements of the learned Attorney-

General are incorrect. The first point in my brief is *not* stated as he declares it to be; nor is even *one* page of my brief—let alone *fifteen*—devoted to the support of either of the two propositions of which he says my first point consists. How gross the misstatement is, almost beyond conception, will be manifest upon referring to the first point of my brief as it is actually expressed. It is in the following language:

"**First Point.**—The power of Congress is "limited in two ways. *First*, it can exercise no "power which has not been conferred upon it by "the Constitution. *Second*, it cannot exercise the "powers which have been thus bestowed in ways, "or for purposes which the Constitution forbids.

"Our first proposition is that the statute in ques- "tion (R. S. Sec. 3894) is invalid as being an attempt "to exercise power *not conferred* upon Congress."

It will be observed that the last sentence contains, avowedly and expressly, the *whole* proposition put forth in the point, what precedes it being merely indicative of the *grounds* of the proposition; and that this proposition simply and pointedly asserts the *invalidity of the statute in question* as being an attempt to exercise power not conferred. And yet this entire sentence is *suppressed* by the learned Attorney-General, apparently—for that is the use made of the suppression—for the purpose of indulging a bit of poor ridicule. Ridicule, when not utterly stupid, has its appropriate place among the weapons of forensic debate; but the masters of that art are scrupulously cautious not to base their raillery upon incorrect quotations.

It may be suggested that the sentence was omitted from innocent inadvertence. But this, if allowed, would not be enough. How could it be thought that the "fifteen pages" referred to, or any of them, were devoted, as alleged, to a support of the propositions that Congress could not exercise powers not conferred, nor powers conferred for purposes, or in ways prohibited, instead of to the proposition that the statute in question was invalid as being an exercise of power not granted, when it plainly appears that the first two propositions are *assumed*, and the "fifteen pages" devoted solely to showing that the act, upon that assumption, is invalid?

Credulity can not honor absolutely every draft which charity, or politeness, may draw upon it. The best apology for this offence is, like the argument employed to support the legislation in question, that it was committed in order to baffle an attempt to support a "nefarious business". But good men should hesitate before employing in behalf of a good cause those methods which most bad men even would reject in the support of a "bad cause."

Second.

The learned Attorney-General commenting upon the argument that Congress had no power to deny to lotteries the facilities afforded by the mails on the ground that lotteries were crimes, for the reason that it had no right to *view* them as crimes, observes that this is perhaps "the most striking fallacy in this branch of the brief" (p. 5). And the reason why it is such a "striking

fallacy" is thus stated by him: "The trouble with "this argument is that it proves too much. The "principle asserted is that any legislation by Con- "gress forbidding the use of the mails in aid of the "perpetration of any crime can have no validity, "unless a federal law directly forbidding, under "penalty, the perpetration of that crime, would "be a valid enactment. A law enacted by Con- "gress for the punishment of murder within a "State would be invalid; therefore, any law that "forbids the use of the mails by conspirators in "aid of the perpetration of such murder is invalid."

If I had made any such argument as this, it might well enough be called a *striking fallacy;* but the imputation of it to me is a striking misrepresentation. So far from employing such an argument, I disavowed it in terms which it seems hardly conceivable could be misunderstood (pp. 32–44). My proposition was that the privileges of the mails could not be denied to a business *not criminal in itself*, and which Congress had no power to make criminal by express legislation, for the purpose not of facilitating the mail service, but solely in order to disfavor and break up such business. I have not denied that Congress might refuse the use of the mails to *attempts to commit crimes*, but the lottery business in Louisiana is *not* a crime in any aspect in which it is cognizable to Congress or this Court, any more than preaching is a crime.

Third.

Subdivision II. of the brief of the learned Attorney-General begins with another misstatement

discouraging and suppressing them, although by indirection, a conflict would arise between the regular discharge of the legislative functions of the respective governments which certainly could not have been *contemplated* by the framers of our Constitution, that being the thing which, as is commonly supposed, they were most solicitous to avoid. This is all moonshine in the opinion of the learned Attorney-General, and he triumphantly answers this *so-called* argument by saying that "exactly that kind of conflict did arise, according "to this Court, in Leisy *vs.* Hardin, (135 U. S. "100) and on the suggestion of this Court, "Congress passed an act with a view to reconciling "that conflict" (p. 11). That is to say, that whenever Congress, or the States, happen to encroach upon the province of the other, the encroachment must be deemed to have been *intended* by the framers of the Constitution, that instrument having been contrived not to be obeyed, but to be violated. What is this, pray, an argument, or a *so-called* argument only?

But, notwithstanding the proposition, to which he refers, does not, in his view, really merit any attention, he perceives one refutation of it so extremely *neat* that he cannot resist the temptation of giving it. The *neatness* will, at least, be admitted whatever may be said of its refuting power. In laying down the general proposition that Congress could not rightfully seek to suppress by indirect legislation practices which it could not forbid by direct legislation, I thought it prudent to anticipate an obvious objection, and remove it by a limitation. It might be said that my proposition laid down without qualification, would prevent Congress from refusing the facilities of the

mails to matter designed to aid the commission of the most heinous crimes, murder, arson, &c., or even to promote hostile enterprises against the government. The proper answer to this objection seemed to me to admit that the government of the United States must be viewed, as all such sovereign political corporations are, as a *moral person*, and therefore not only permitted but bound, to so use all its powers as not to favor immorality. But it so happens that what is *moral* and what *immoral* is a matter upon which mankind are by no means ageeed, indeed, there are no questions upon which differences of opinion are so perplexing and charged with animosity as this. There is, however, a wide range of practices which, in the view of mankind generally, or at least of those parts of it whose standards of thought and action are sufficiently similar to enable them to form political and social unions together, are criminal, and as to which there is little danger of disagreement. So far there can be no hesitation in allowing a government of limited powers to so shape its exercises of them as to promote morality, or at least to disfavor immorality, even though the power of direct punishment should not be entrusted to it. At the same time there are many other practices which may be said to be indifferent in respect to the point of morality; or, to speak perhaps more accurately, there are many practices in respect to the morality or expediency of which different communities and different individuals of the same communities entertain widely different opinions. These are regarded as innocent until they are forbidden by positive law. They are violently condemned by some communities, and may be permitted, and even encouraged, by others. Great reluctance is often exhibited on

the part of a minority to submit to the decision of the majority in the same community upon these points; but no self-respecting community would allow a policy upon such questions to be dictated to it by an outside government or people.

The distinction thus drawn is very nearly, if not entirely, identical with that which separates what are called *mala prohibita* from *mala in se*, and is and was, at the time of the adoption of the Constitution, entirely familiar to the judicial tribunals and often acted upon.

I ventured to think that here was to be found the boundary beyond which Congress could not pass; that it could not in respect to subjects of legislation reserved to the States, treat practices as immoral which were not *mala in se*, and enact laws which, though not directly forbidding and punishing such practices, were *clearly*, and *indeed avowedly, designed to prevent and break them up, and for no other purpose.*

To this the learned Attorney-General answers (p. 11): "But it is hardly worth while to further "notice this so-called argument, that the legisla- "tion of Congress can not indirectly disfavor "what it can not directly suppress, because coun- "sel himself admits that as to offenses *mala in* "*se* such a limitation does not exist. In other "words, he announces as the basis of his "entire argument this general principle, and "then gives his whole case away by admitting "that as to most offenses his principle has "no application. Such a principle in law is as "valuable as the great discovery in science that "the reason why water will not rise above its sur- "rounding level in an exhausted tube is 'because "nature abhors a vacuum'; and is subject to very

"much the same sort of limitations as was neces-
"sary in regard to the latter great discovery. To
"account for the fact that notwithstanding the
"great principle that water would rise only to a
"specific height, it was said that 'nature abhors a
"vacuum only to the extent of thirty-three feet'"!
According, therefore, to the learned Attorney-General's philosophy, no propositions can be sound if they are subject to any limitations! To qualify is "to give one's whole case away"! This "whole hog or nothing" logic does not seem well adapted to legal discussions in view of the circumstance that nearly, if not quite, the whole body of the law has been, and is being, built up by the ceaseless process of making exceptions to, and qualifications of, propositions more or less general in their character. In what school was the learned Attorney-General taught these extraordinary processes of reasoning, or did he perhaps find himself unable to resist the temptation of letting fly at his adversary's argument a shaft of ridicule—his favorite weapon—by likening it to the absurdity of nature's abhorring a vacuum to the extent of thirty-three feet? He might have remembered the occasional consequences attending the use of such, or similar, weapons.

"Which though well aimed at duck or plover,
"Bear wide, and kick their owners over."

And there is a possibility that his inability to accept the distinction upon which I have ventured to rely with some confidence arises from a difference in our respective conceptions of what *mala prohibita* and *mala in se* really are. I have sufficiently indicated my view of the nature of the acts which are respectively designated by these terms. We

have one intimation of his conception at the foot of page 13 of his brief where he says, "Duelling is certainly not *malum in se*"!

He intimates that difficulty would be found in applying the rule suggested by me, in determining what acts might fall under the designation of *mala in se*. This is not unlikely. It is incidental to every legal rule; but this is no reason why it should not be adopted; and the circumstance that the distinction upon which it is founded is not a new one, but one long familiar to Courts, and frequently acted upon, is good ground for the expectation that the cases of difficulty will be rare. The learned Attorney-General supposes that he suggests such difficulties by citing a passage from Blackstone to the effect that "All disorderly inns or alehouses, "bawdy houses, gaming houses, stage plays, un- "licensed booths, and stages for rope dancers, "mountebanks and the like are public nuisances, "and may, upon indictment, be suppressed and "fined"; and, saying that these are all common law misdemeanors, he asks, "Will counsel indi- "cate which of these offenses might be 'disfavored' "in the mails and which not on the *mala in se* "principle?" (p. 14.) I find no difficulty in saying that all the establishments and persons in the above enumeration might be thus disfavored. If "disorderly," they are in breach of the public peace, and, therefore, *mala in se*. It could not have been supposed at the time of the adoption of the Constitution that the people of any State would object to any useful assistance which the general Government might indirectly render to the breaking up of *disorderly* practices of the above nature.

The learned Attorney-General can perceive

nothing pertinent in the reference to the case of *The Antelope* (10 Wheat., 66), but I am confident this Court will, and I embrace the opportunity to again commend that decision, and particularly the method and spirit in which it is reached, to its best attention.

Sixth.

The learned Attorney-General declares (p. 2) that "the main effort of counsel for the petitioners in "each of the briefs seems to be to *becloud the* "*issue*"; but he admits that this was no disappointment to him, because he says it "was to be "expected." As it is not to be supposed that he intended to intimate that this expectation arose out of his estimate of the characters and methods of the particular counsel to whom he refers, we are left to the inference that in his view attempts to *becloud* the issue are a common practice of all counsel, himself included. I for one must take the liberty of disclaiming any intention, at least, to employ such a device, and can hardly understand how any well instructed lawyer should suppose that such a method would be serviceable.

The *way* in which he supposes the attempt to be made "to becloud the issue" he points out thus: "To this end (that is, of beclouding the issue) their "entire arguments assume that the refusal of the "general Government to be the instrumentality for "the circulation of lottery literature is the same "thing as forbidding the publication or circulation "of such literature; that the only escape from a "violation of the * * * * prohibition in the

"first amendment to the Federal Constitution "against making 'a law abridging the freedom of "the press' is for every official of the Post Office "Department to become the servant and every car- "rier the errand boy of the Louisiana Lottery "Company."

"They *totally ignore* the fact that the sole effect "of the act of Congress is that the general Gov- "ernment, its officers, employees and agencies, "shall in no way aid or abet this business" (pp. 2 & 3).

The learned Attorney-General could scarcely have read pages 20–26 of my brief, which contain a separate point with argument and illustration devoted to an attempted refutation of the view which he asserts to have been "*wholly ignored.*"

Seventh.

The learned Attorney-General seems to find much difficulty in making a clear and concise statement of any proposition defending the legislation in question. On page 15 he lays down a proposition which, from the italics he employs, might be supposed to be the precise view which he wishes to be understood as maintaining. It is in these words: "*In brief, I maintain, without fear of "successful contradiction that whatever acts or "enterprises Congress has the power to make "criminal in the District of Columbia, or the Ter- "tories, it may refuse directly, or indirectly, to "aid, encourage or abet in any State without vio- "lating any obligation either to citizen or State.*" But why not say at once that Congress may exclude from the mails any matter relating to acts or

enterprises which it might make criminal in the District of Columbia or the Territories, if that is what he means? And if he does not mean that, the proposition does not cover the case. Why shape a proposition which the opposite party can not meet without admitting that carrying matter relating to a particular business is *aiding*, *encouraging* and *abetting* such business? This, it is submitted with great deference, is "*beclouding the* "*issue.*" No person should *aid*, *encourage* or *abet* any business which he deems criminal or immoral, nor certainly should any government do so, if it has any duty or right to inquire into and determine the moral character of the business. These words "*aid*," "*encourage*" and "*abet*" have assumptions involved in them which have nothing to do with the question before us, and are consequently calculated to mislead. They carry with them the notion of *consciously* aiding and facilitating a business for the express purpose of doing so, as a man's employees whom he hires and pays for their services aid him. Many of the functions of government *enable* many immoral enterprises to be carried on, which, without such aid might be impossible, or more difficult, but a government can not for this reason be justly said to *aid*, *encourage* or *abet* them. And the same criticism is applicable to the styling of the officers of the postal service as the *agents* of those who deposit matter in the mails. Such terms are misleading. Neither the government nor any of its officers become the agents of any one by simply performing the public duty of carrying on the mail service any more than a court becomes the agent of a plaintiff when it renders judgment against a defendant.

The learned Attorney-General tries his hand again at a proposition. On page 10 he says: "But, "without further discussion of this part of peti-

"tioner's brief, what is the position of the Govern-
"ment? (Now, then, we may surely expect
"something upon which we may join issue.) As
"already stated, I maintain that in the exercise of
"this power of legislation in regard to the mails, as
"in the exercise of many of its other legislative
"powers, Congress has a very broad discretion as
"to whether it shall act at all, and if so when and
"to what extent, and for what purposes it shall
"act. As to the mails, this discretion goes to the
"matter to be carried, to the manner and frequency
"and places of such carriage, the compensation
"therefor, and, in short, the whole matter." But what does all this mean? Apparently it asserts only that Congress has a very broad discretion in framing legislation in regard to the mails, which no one, I suppose, doubts. But has it the right to exclude matter from the mails solely on account of its moral character, when such matter is not criminal in itself, is lawful and innocent by the laws of the State where it is mailed, and is not such matter as Congress has any direct power to make criminal? This is the point directly upon which a proposition from the learned Attorney-General would be very much in order.

His proposition as last above stated may have been intended to assert for Congress an absolute and *unreviewable* discretion; but he does not *say* quite that. His language is "a very broad discretion" * * * as to the "whole subject matter." And he concludes that this proposition may need some limitation in order that it may stand consistently with many decisions of this Court. And he proceeds to limit it, forgetting how he had laughed at me for limiting some of my propositions. He says: "Nor, in order to maintain the validity of

"this legislation is it necessary to assert that Con-
"gress may exercise a purely arbitrary discretion
"in the matter. If by arbitrary discretion is
"meant a discretion under like conditions, to dis-
"criminate without reason in favor of some as
"against other classes of our people, or in favor of
"some as against other legitimate avocations, it
"may be conceded that such legislation would be
"invalid within the principles announced in *Ex*
"*parte* Garland" and other cases mentioned by
him. This is about to the effect that the discretion
of Congress in the premises is absolute except to
the extent that it has been qualified by the Supreme
Court; and we are about as much enlightened con-
cerning his precise view as if he had said "absolute
"to the extent of 33 feet." But he seems to allow
that if Congress should deny the privileges of the
mails to one *legitimate* avocation while it granted
them to others, its action would be invalid. Now
this, if interpreted as if the language were employed
with studied precision would be quite sufficient for
the purposes of the petitioners. The lottery busi-
ness must, in the eye of Congress at least, be
viewed as a legitimate avocation. It was univers-
ally so regarded when the Constitution was adopted.
Congress has no power to declare it otherwise.
When and how has its character been so changed
that Congress may now deem it an illegitimate
avocation? But the rule of truth and candor which
requires us to accept the language of others in the
sense in which we suppose they intended it does
not permit us to so interpret our learned
friend. What *he* means by "legitimate
avocation" is an avocation which *Congress*, in the
exercise of a discretion, absolute, except to the ex-
tent of (we know not what—33 feet, perhaps—but

broad enough to include the lottery business), *chooses to consider* legitimate. But he proceeds to further explain his precise meaning as to the nature and extent of this Congressional discretion, and says: "If by denying the right to exercise "an arbitrary discretion it is meant to assert that "Congress, in exercising any power of legislation "has not the right, and is not under obligation to "so exercise that power as not incidentally to aid "in the commission of wrong either to the public "or to individuals, then the proposition is utterly "denied." But the issue is becoming *clouded* beyond the possibility of discernment. What *wrong* was done by the mail service, either to the public or individuals, prior to the passage of the statute in question? And if a singling out of a lawful occupation, and denying to those engaged in it the benefits of that service, is not a wrong to them, what is wrong?

But the learned Attorney-General makes another and final attempt to define his position. He says: "In other (and let us hope, at least, in clearer) "words, *my proposition is simply this* (italics "mine). The United States Government, like an "individual, or a private corporation, or an ordin- "ary municipal corporation, is subject to that great "rule which pervades all well-ordered society, that "no one shall so use his own property, franchises "or powers, as that, in so doing, he shall inflict a "needless injury upon the property or personal "rights of individuals, or upon the well-being of "society." But we must stop. We are at every step departing from, instead of coming closer to, the issue. That the salutary maxim in the private law of property, *sic utere tuo ut alienum non loedas* embodies a high moral precept which may

be usefully had in view in the public business of legislation will not be questioned; but it will furnish little aid in determining whether a government like ours of limited and enumerated powers may, under the *form* of exercising one of the powers actually bestowed upon it, seek to affect a subject carefully withheld from its control.

Eighth.

The difficulty with these various efforts of the learned Attorney-General to frame a proposition, a denial of which would raise for argument the point really in issue, is that they all in some manner *beg the question* by a concealed assumption that Congress is bound to regard the lottery business as wrong, just as murder and arson are wrong. This is the very point to be proved. It is quite manifest that he shrinks from stating the proposition which, if sound, would defend this legislation; and I cannot help thinking that it is for the reason that such a statement would exhibit infirmity and error upon its face.

I must venture, therefore, to frame a proposition for him which will contain no inadmissible assumption, and the whole of which must be made good, or this statute be condemned as invalid. For this purpose, his own language on page 15 of his brief, may, in part, be borrowed. He would have hit the point if instead of talking about *aiding, encouraging and abetting*, he had said as follows:

"In brief, I maintain, without fear of successful "contradiction, that whatever acts or enterprises

"Congress has the power to *make* criminal in the "District of Columbia or the Territories, it may "*treat* as criminal in the exercise of any of its "express powers, including the power to establish "post offices and post roads; and exclude from the "mails all matter connected with such acts or en- "terprises *because* they are criminal, and *for the* "*sole purpose* of disfavoring and, as far as pos- "sible, suppressing them."

The learned Attorney-General may not like the form of the above proposition, but it is precisely what he should be *understood* as asserting on page 15 of his brief. Otherwise his proposition in that place means nothing pertinent to the present discussion.

I venture to think that the learned Judges of this Court will perceive that unless the proposition, *as last* above stated, is sound in all its parts the statute in question must be condemned, and, although it is in substance the same proposition against which the first branch of my original brief is directed, I may here properly add some observations which this discussion of the Attorney-General's brief has suggested.

1. If the doctrine of the proposition be true, it follows that Congress might and *ought* (for the business is far more "nefarious" than carrying on a lottery) to have denied the use of the mails to any matter connected with dealings in slaves, or in any way supporting slavery, and it ought also to have denied the jurisdiction of its courts to any suit growing out of the existence of that relation. The rigid exercise of such powers would have made it

impossible to carry on any correspondence relating to slaves, impossible, in many cases, to recover the price of a slave when sold, or for his use when hired, or damages for an injury inflicted upon him, or his value when stolen or converted ; impossible to advertise for a runaway, and impossible to defend, in public journals, the character of the institution against the moral assaults of mankind. A power to so affect an institution is a power to destroy it.

Moreover, the powers of Congress are really the powers of the people, for they make the Congress ; and inasmuch as we are all morally bound to exercise whatever rightful power we have for good, those who believed that slavery was wrong—and they constituted from the first a very large number, if not a majority of the people—were in duty bound to carry their views into effect ; to arouse the public mind to the necessity of throttling this inhuman business by Congressional legislation ; and to form national parties upon the question, a course which would eventually carry into the national legislature a majority sufficient to give effect to the public voice. And the Attorney-General's argument is, and must be, that such use of power would have been *in harmony* with our constitutional system, and *within the contemplation* of those who framed it. And all this when we know that the slave-holding States demanded and obtained as a condition of entering into the Union a stipulation that fugitives from slavery should be returned to them ! The argument asserts that while safeguards were demanded and given against *one* of the hazards to which slavery was exposed, the whole system was *intentionally left open* to the irresistible assaults which a hostile majority might,

and inevitably would, rightfully make upon it by legislation purporting, so far as *form* is concerned, to proceed from the exercise of powers over other subjects, but avowedly, expressly and *solely* designed to effect its destruction. There never has been a constitutional lawyer of any school who has dreamed of imputing such an intention to the statesmen who undertook for us the delicate task of dividing and distributing among the people of the States and the general government those powers which sovereign nations exercise.

2. The illustrative instance of slavery is the most striking one, because it happens to be an interest more likely to invite attack, and is easily susceptible of the kind of indirect attack which is aimed by the statute in question against lotteries; but there are many other interests and occupations upon the morality or expediency of which opinions widely differ. The business of making and selling intoxicating liquors is an instance which readily suggests itself. Some think this business as innocent and praiseworthy as any, others regard it as "nefarious," and one which ought to be absolutely suppressed by the most rigid laws. No one denies the power of the States to limit or forbid it altogether. Political parties are formed for the purpose of enforcing the views of the disputants, and political controversy of the most violent description is thus engendered and carried on; and, besides this, political chicanery of every form is studied and practiced by the politicians of the other great parties to "catch the votes" of the heated partisans of one, or the other side. No objection is

made to this. It is one of the incidents of democratic government. In the end, after the due amount of deception and disappointment, the majority will triumph, and, if it be of the party which favors prohibition, will procure the passage of a prohibitory law. But to enforce it! "there's the rub." But if the privileges of the mails, of the Federal Courts, and of foreign and inter-state transportation could be denied to the business, it would be worth more, for the purposes of suppression, than a whole army of policemen and police justices. According to the learned Attorney-General, this contest should be extended to the national arena, national parties should be formed and all the machinery of demagoguery set in motion upon the questions whether liquor selling should be treated as a crime, and whether Congress should continue to "*aid*, *encourage* and *abet*" the "nefarious business" by giving it the privileges of the mails, the Courts, and inter-state transportation. Should the prohibitionists seat a Congressional majority, a singular spectacle might be presented. Liquor selling would be treated as a crime by Congress, while many States would treat it as innocent. The national legislation would be reshaped whenever its powers might be used for the purposes of repression;—two sovereigns upon the same territory, legislating upon the same subject, upon policies and with objects directly opposed, and the laws of both taking effect! Has human infatuation ever fallen into a deeper absurdity! And yet this is the scheme which the learned Attorney-General's argument imputes to the founders of our government as the one *intended* by them.

3. The learned Attorney-General seems to think that it supports his argument to ask whether Congress could not rightfully refuse to carry mail matter relating to trading upon margins in wheat or stocks. Certainly not; this instance serves my purpose, not his. The question whether mere speculation in merchandise or stocks is injurious or not is not a question upon which people are *agreed*, as they are upon the point that murder and arson should be prohibited, but upon which they widely *differ*. The best political economists teach us that speculation in food is beneficial, always having the effect of inducing economy in use at an early period in seasons of scarcity, and having a tendency on the whole to enable the poor to obtain their supplies at the lowest rate. At what point speculation ends and mere gambling begins, is again a question upon which people are widely at variance in their opinions. And they are by no means agreed as to whether it is expedient to prohibit by law those forms of pretended dealings in merchandise or stocks which make up what is called the "bucket shop" business. The magnitude of the evils which flow from the present enormous volume of this last mentioned business, are probably many times greater than any arising from the lottery business; and if Congress is to endeavor to suppress lotteries by indirect legislation, it should forthwith turn its attention to this business also. And it must be careful not to discriminate against the humble devotees of the Goddess Fortune, who wish to hazard their mites, but strike at the powerful as well as the lowly. The *bucket shops* must not alone be aimed at. Are the supposed vices of New Orleans to be repressed, and those of New York and Chicago to be "*aided, encouraged* and

abetted" ? There is no doubt that the prohibition of dealings like these is a legitimate subject for legislative action in the States, and for the action of Congress in respect to the District of Columbia and the Territories. It is not open to the objection that it deprives men of fundamental rights. It is, therefore, according to the Attorney-General's argument, a proper subject for the indirect *disfavoring* legislation of Congress. What might be the result ? A conflict between the parties of prohibition and freedom is carried in the States of New York and Illinois, and the wisdom or folly of their legislatures decides overwhelmingly in favor of unrestrained freedom. This might be supposed to settle it ; but no ; some votes may be caught at a presidential election, for the one party or the other, sufficient to turn the balance of those great States by the promise to the defeated party of the aid of indirect Congressional legislation, and the same question is transferred to the national arena. The political bid proves successful; and the vote of one or the other of the great States named brings victory to the party offering it. The people of the other States care but little for the pangs their fellow citizens in New York and Illinois may feel at having some of their favorite occupations throttled, and their representatives in Congress deny the benefits of the mail service and the Courts to the traffic which has been drawn in question ; and this, not because they think the traffic wrong, probably not thinking much about that, but because they have *contracted a political debt* which good faith requires should be paid. Is this the way in which the statesmen of Massachusetts and South Carolina supposed they had reserved to the inhabitants of their respective States the entire control

over their internal policy? Did no suspicion cross their minds that if the internal policy of the States was in any manner subjected to the indirect control of Federal legislation, the right of local self-government might be most seriously imperiled? Did they think that in surrendering the franchise of the mail service so that they could no longer carry the letters which their own views of their own interests demanded to be carried, the Federal Government might refuse to carry them, and they be absolutely crippled and without remedy?

4. The learned Attorney-General says that I "give my whole case away," because I admit that Congress might refuse the privileges of the mails to matter designed to facilitate the commission of the crimes of *murder*, *arson* and other *mala in se*. His logic frames a syllogism of this sort. "My "adversary admits that Congress has the right to "exclude from the mails matter designed to facili- "tate what are universally regarded as crimes, al- "though it has no direct power to punish for such "crimes. He must, therefore, admit that Congress "has the like power to exclude matter relating to "acts which it chooses to regard as criminal, al- "though the opinions and the practice of the "people of the several States differ upon this "point, and although the power of settling the "disputed question by direct legislation has not "been conferred upon Congress, but industriously "reserved to others." That his reasoning involves the utterly inadmissible results already referred to of a power in Congress to attack and undermine by indirection, the most cherished institutions and in-

terior policy of the States, is nothing to him. I cannot help thinking that the learned Judges of this Court perceiving that we may reasonably suppose that the framers of the Constitution may have intended that Congress might to some extent and for some purposes at least, so shape the exercise of the express powers conferred upon it as to disfavor crime; and yet that it is impossible to think that they intended to bestow an absolute discretion of this character to attack and disfavor any practice which it might regard as criminal, notwithstanding such practice might be deemed wholly innocent, or even praiseworthy, by the people of the States, will naturally inquire if there is not some line of distinction which may serve to indicate what the *contemplation* of the Constitution is upon this point; what the intention of those who framed it, and of the people who accepted it, really was; for that is the real question. When we have ascertained, if we can ascertain, the probable *intentions* of the authors of the system in respect to a matter as to which they have made no express declaration, we shall be justified in conforming our interpretation thereto. Notwithstanding the fullness with which in my original brief I have endeavored to show that the line which separates *mala prohibita* from *mala in se* should be accepted as the true line of distinction, I shall be excused, upon a point so interesting and important, for some prolixity even; and I think something may be added which may render this distinction more directly pertinent to the real object of inquiry, namely, the intention of the framers of the Constitution.

As I have said in my original brief, the great and fundamental distinctions between right and

wrong—between what is innocent and what is criminal—are not *created* by governments or laws. They exist antecedently to both; governments being in fact, formed to enforce these pre-existing distinctions. This, if not self-evident, is made clear by the circumstance that we find in the rude beginnings of every nation that a system of judicial administration always antedates the existence of formal laws. A judge is appointed and executes his functions. He administers justice according to the informal rules which are to be found in the habits, customs and thoughts of the people. Indeed, it may be said with entire accuracy that the existence to some extent of these distinctions must antedate the existence of any society whatever; for society is not possible without them. In their absence all mankind are at war with each other. And it is also true that in every homogeneous society the fundamental distinctions between right and wrong are universally *understood* and *agreed* upon. This is, in fact, what makes a homogeneous society, and renders a common government over it for all purposes practicable. The knowledge of these distinctions is part of the ethical culture of the society and springs from common habits, common customs and common purposes and beliefs. This is made quite clear by the circumstance that at the time of the adoption of our constitution, the great bulk of the criminal law of England, and of the American colonies as well, had no existence in the form of legislative enactment. It rested in habit and tradition aided and made definite by judicial decisions. But when I speak of the great and principal distinctions between what is criminal and what is innocent, I mean of course not the theoretical distinctions, but

those established by common customs, habits and beliefs. These are necessarily the same among all the members of the community, and are *substantially* the same among all communities which have reached the same stage in civilization.

When the framers of the Constitution assembled they did not purpose to form one consolidated government for all the States. They well knew that the differences in institutions and interests exhibited by the several communities rendered this wholly impracticable. Their effort was to single out certain functions of government which could not be exercised separately without producing conflict, inconvenience and weakness, and lodge these in a newly organized government for the whole. They designed to surrender common interests to a common control, and to leave each individual State to shape and cultivate its own internal policy, and work out its own destiny in its own way. They lodged with the new government which they organized, certain high powers primarily and principally for the direct purposes which such powers are capable of effecting. It so happens, however, that while the agencies created by the exercise of these powers afford facilities for carrying out the just objects of men, they are sometimes available for facilitating crime. The power to establish a mail service is notably of this character. Must its benefits be accorded to all persons for all purposes? This could not have been intended. It could not have been intended that the government was bound to extend the facilities of the mails to hostile conspiracies against its own existence, nor to conspiracies to commit murder. And it is equally clear that it could not have been intended that it should deliberately contrive an attack upon the institutions or the policy of

any of the States by denying to them the privileges of the mails. Can we know, and how are we to learn, the boundary line beyond which the new government could not pass in refusing the benefits of the agencies created by it? The Constitution itself is silent so far as express language goes; but the line is nevertheless so clearly drawn for us, in the nature of things, so to speak, as, it seems to me, to be almost self-evident upon the merest statement. They could not have objected to the denial of these privileges to the purposes of crimes, meaning by crimes those offences which *all agreed* were crimes, or which *all agreed* the new government might declare to be crimes against itself, and punish as such. This would be in direct furtherance of the common purpose of all. The first class of offences were perfectly ascertainable. They had been perfectly well known for the most part, even without written definition, to them and their ancestors, for centuries. They were all engaged in stigmatizing and punishing them as such. And as to the second class, they could not but agree that the new government might refuse its facilities to such offences as *all agreed* it might declare to be crimes against itself and punish as such. But how as to other possible offences which the general government could not declare to be crimes against itself, and as to which all were *not* agreed in respect to the treatment, some permitting and others prohibiting, and especially how was it as to acts which all permitted, none thinking that they were to be viewed, or could be viewed, in the light of crimes—some of them, slavery notably, universally regarded by a large number as essential elements of their social condition and welfare? It is impossible for any candid mind to think that there was any intention on the part of the framers of the Constitution other than

that the general government should rigidly refrain from any discriminating legislation against such acts. The distinctions thus drawn are two; but they are nearly, if not precisely identical. One is the distinction between *mala prohibita* and *mala in se*. The other makes the class of offences which may be thus disfavored cover all which, by the then existing laws of all the States, were denounced and punished as crimes, whether *mala in se* or *mala prohibita*. The first distinction is, perhaps, the safer one. But neither can be far from the probable intention of those who framed the Constitution.

And finally let it be supposed that the proposition had been moved in the convention that Congress, in providing the public agencies and instrumentalities authorized by the powers conferred upon it, might in its discretion deny the benefit of them to such pursuits, occupations and practices as it might deem of immoral tendency or prejudicial to the public good, would even one of the most ardent advocates of a powerful central government have supported it? And had it been proposed in the First Congress, when the mail service was established, to deny its benefits to the institution of slavery, or to lotteries, or to any business or practice whatever which the laws of any of the States then permitted, would there have been a member of that convention who would not have denounced it as a base proposal of a breach of good faith?

Ninth.

The learned Attorney-General throws out the notion that the discretion of Congress goes to the ex-

tent of how far it will act, and how far it will not act in bestowing the privileges of the mail service, and consequently that in not bestowing them upon lotteries it is simply *not acting*, and in this does not offend the Constiution any more than it would if it had failed to extend the mail service to books and parcels. But he does not press the view. This is rather to be wondered at, for the argument has much of the same sort of merit which distinguishes some of the other positions he has taken.

To this I venture to think that it is a sufficient answer to say that the benefits of the mail service are destined by the Constitution to be bestowed *equally* and upon *uniform* rules upon all the people, and that the trust is betrayed if discriminations are made upon no other ground than that some occupations are to be disfavored, and if possible broken up as being criminal or immoral when Congress has no proper concern with the question of their criminality or immorality.

But if this defence of simple *non-action* were available, it certainly would extend to every case of *non-action*, and therefore Congress might fail in like manner to extend the mail service to the legal profession. This would not be, on the argument that Congress has a discretion as to how far it shall act, a *taking away* of any existing fundamental right ; it would be simple *non-action*.

To be sure, if Congress had wholly failed to establish any mail service no citizen could ask to have its *non-action* declared unconstitutional. Mere negations cannot be thus assailed. And of course no *mandamus* lies to compel a supreme legislative body to perform its functions. But the establishment of a mail service for a part of the people to the exclusion of the rest, or for some occupations to the exclusion of others, the discrimi-

nation having *no relation* to the exigencies of the service itself, but being founded upon an intention to disfavor those excluded, is a breach of the Constitution, and all affirmative laws designed to enforce the exclusion are invalid. Indeed what is the *meaning* of "post offices," as used in the Constitution? Does it mean anything less than a place where all may deposit the mail matter which their business or pleasure calls upon them to send, and where they may receive such as may have been addressed to them? Does a place where *some* may do this and not *others*, answer the definition? Does the Constitution authorize an establishment like the latter to be set up? Was it necessary that its authors should have added to their grant of power the words "for the equal benefit of all," in order to make their meaning more plain? Even this would have done no good upon the principles of interpretation which the learned Attorney-General teaches; for would not Congress still have a *broad discretion* to say what was for the equal benefit of all? Those renowned statesmen, themselves men of rectitude and honor, confided in the rectitude and honor of other men. So confiding they did not hestitate to make a mutual surrender of powers, which, if *perverted*, might have made them slaves. They presumed that their language would be read in the light of the known objects and purposes for which they had assembled. Had they suspected that it would be interpreted according to the rules which the learned Attorney-General would apply, they would have scorned the idle office of framing a written Constitution.

Tenth.

In my original brief I have referred to the observation of Mr. Justice Mathews to the effect that under our system of government there is no room for play of *arbitrary* power under the form of discretion or otherwise. The observation may be extended. In respect to power over others, that is, political power, it may be said with perfect truth, that there is no room for the play of merely arbitrary power in the moral world. The most absolute despot holds his power upon a *trust* to use it for certain *limited purposes*, namely, the good of his people. If he confines it to those purposes, he is a beneficent sovereign; if he betrays it, he is a *tyrant*. There are two forms of tyranny; one is the use of power *not granted;* this is the tyranny of usurpers. The other is the *perversion* of power by those who rightfully hold it to *purposes* for which it was never granted. Were it worth while to inquire which of these forms of baseness is the worst, the bad pre-eminence must be assigned to the latter. Under the former, good government is still possible. Its powers may yet be applied to their proper objects. Who the *trustee* is may be a matter of comparatively little moment, if the *trust is observed*. Pisistratus *acquired* his power by stratagem and force; but he *used* it for the public good, and Athens flourished under his rule. We ourselves tolerate a form of this species of tyranny with indifference. Our doctrine of officers *de facto* requires us to yield obedience to a magistrate who has succeeded in seizing an office though he has no title to it. But there is no qualification or mitigation to the mischief which comes from power *perverted*.

Under despotic governments, the only trust or

limitation to which political power is subject is the public good. It can be perverted, only by using it for the personal purposes of the despot; but it is the peculiar characteristic of limited and constitutional governments that the *purposes* for which the powers bestowed may be employed are defined and perscribed, sometimes expressly, more frequently by implication derived from the nature of the powers, but always in one form or the other.

It is a misconception into which men often fall that in substituting popular in the place of despotic governments the danger of tyranny is removed. Tyranny springs from the dispositions of men, and not from forms of government. Power may be perverted, as well under republican as under others, and indeed it may be *usurped*. Our forms of usurpation consist in the practices, not so much condemned as they should be, in the suppression, the purchase or the false counting of votes. A majority thus obtained is one form of tyranny. The perversion by a majority, even though honestly gained, of the powers of government to purposes other than those for which they were bestowed, is the other form of tyranny; and the statute in question is an example.

It is the peculiar characteristic of our government that it furnishes a remedy against this latter form of tyranny by providing a judicial tribunal with power to determine whether those to whom its powers are entrusted exceed them, or pervert them; for they are always exceeded when they are perverted. Neither department of the government has power to *pervert* its powers. This function of this Court imposes upon it the duty of declaring the *extent* of the powers of Congress. Their *limitations* must be ascertained and declared; and one of

the limitations of every power is that its exercise must be confined to the *purposes* for which it was bestowed. Unless this Court performed the office of thus declaring the limit of the powers of Congress the safeguard it is supposed to furnish against violations of the Constitution would be little more than an empty boast.

Eleventh.

In making the judicial inquiry whether Congress has *perverted* a power bestowed upon it, the first thing in order is to ascertain the *purpose* or *end* sought to be effected by its action, so that it may be compared with the purpose for which the power assumed to have been exercised was granted. If the apparent object or end be one of those for which the power was conferred, and the *means* employed by the act have some relation to that end, judicial inquiry must cease. The wisdom of Congressional action is not open to the animadversion of Courts. But the inquiry always extends to the *object* sought to be accomplished and the *means* employed. This is the method consistently pursued by this Court in a long line of cases embracing inquiries into the validity of State as well as Congressional legislation; for it is equally applicable in both cases. I may here repeat the formula drawn by the hand of Marshall: "Let the end be legitimate; let it be "within the scope *and spirit* of the Constitution, "and all means which are appropriate, which are "plainly adapted to that end, which are not pro- "hibited, but consist with the letter and spirit of "the Constitution, are constitutional," and ask

"Is a law of Congress excluding matter from the "mails, not for the purpose of facilitating the mail "service, but solely on the ground of the supposed "injurious public tendency of the business to which "it relates, and for the sole purpose of impeding "that business, such business being neither *malum* "*in se* nor prohibited in any State at the time of the "adoption of the Constitution, nor made subject in "any way by the Constitution to the authority of "Congress, within the scope of the power of that "body?"

Twelfth.

Inasmuch as this paper is intended by way of reply to the brief of the learned Attorney-General, and he has not chosen to make any definite attack upon the second branch of the argument of my original brief, I do not find occasion to make, in this place, any additional observations upon the point that the statute in question is invalid as abridging the liberty of the press. That question is submitted with undiminished confidence upon the grounds and authorities set forth and referred to in that paper.

Thirteenth.

Mr. MAURY'S ADDITIONAL BRIEF.

Since the preparation of the foregoing review of the learned Attorney-General's brief, an additional brief by Mr. Maury has come to hand, which I have read with interest.

Mr. Maury briefly excuses the preparation of his paper by a reference to circumstances supposed to have been unfavorable to a complete discussion of the questions involved in his original brief.

Certainly, no further excuse can be needed; nor indeed, is any apology necessary for submitting to the Court any views which may be the fruit of more matured reflection.

It may, however, be properly suggested that if matured reflection during a period of several months, after an opportunity to study the brief of the petitioners, has not resulted in the discovery of a sufficient answer to it, probably no such answer can be found.

The good temper and moderation of Mr. Maury's second paper is admitted, but I feel obliged to say that whatever of apparent force it may have, so far as it is designed to be an answer to my original brief, consists in imputing to me propositions never asserted by me and then answering those. I must seek to make this observation good by some reference to the main points of his argument.

He first imputes me (p. 2) the proposition that Congress is limited, in the execution of a granted power, to such means as are indispensably necessary for that purpose. I have made no such proposition; and supposed that I had taken good care not to be so understood (p. 7 of my original brief),

I have fully admited that where a power is granted to Congress it has wide discretion in its choice of means. Those means need not be such as this Court may deem to be the best, or most appropriate, means. It is enough that Congress thinks them to be appropriate. What I do insist upon is simply this:

First.—That they must be *means*, that is to say, that they must have some *relation* to the accomplishment of the *object* or *end* which has been placed within the power of Congress. In other words, this Court must be able to see that they are *conducive* to that object or end; and if the means employed under the *form* of executing a granted power have *no relation* to the purpose for which the power was granted, but are plainly and avowedly for a *different purpose*, the action of Congress is unauthorized and invalid.

And; *secondly*, that the means employed must not, even if conducive to the object properly in view, be such as the Constitution itself prohibits.

I thank the learned counsel for his approving reference (p. 4), to the lectures of Mr. Justice Miller, in which that learned Judge has described the laws which Congress may pass in the execution of its powers as "laws, not absolutely necessary "indeed, but appropriate, plainly adapted to "constitutional and legitimate ends, laws not pro- "hibited, but consistent with the letter and spirit "of the Constitution; *laws calculated to effect ob- "jects entrusted to the government.*" It is impossible to better express my view of the measure of the powers of Congress.

The learned counsel in referring to the distinction relied upon by me between *mala in se* and *mala*

prohibita, imputed to me the view that Congress is authorized by discriminations in the mail service to disfavor offenses that are *very* hurtful, but not those which are of less enormity. He says (page 2): "It "is not disputed that lotteries are hurtful, but the "contention seems to be that they are *not hurtful* "*enough* to warrant the legislation complained of." This, again, is a misapprehension of my argument, which, it seems to me, I left no room for. My argument was and is, that this is a government of *limited powers*, formed, not for *general*, but for *special*, objects; that it was very certain that the people of the States could not have intended to submit to Congress the regulation of their own internal concerns, nor that Congress should exercise its granted powers in any case with the sole view of repressing or disfavoring practices or interests which the various States, or some of them, might allow and extend favor to. I admitted, on the other hand, that Congress might, in the exercise of its granted powers, so shape such exercise as to disfavor what were universally conceded to be crimes and what the people of all the States must be presumed to have wished to be disfavored. And I illustrated this view by stating that the indirect disfavor of such crimes as murder, arson, &c., might fairly be presumed to have been conceded to Congress; but that, on the other hand, the treating of practices and institutions which some of the States regarded as innocent, and proposed to continue to regard as innocent, among which were some which could not be interfered with without shaking the foundations of existing society, such, for instance, as slavery—as crimes in order that they might be indirectly repressed, could not by any one be supposed to have been within the intention of the framers of the Con-

stitution. Hence arose the necessity of drawing a distinction; and my argument was that the line which separated *mala in se* from *mala prohibita* was obviously the one which should be drawn; and, consequently, that while Congress could recognize as crimes what everybody admitted to be such, it could not recognize as crimes those practices which were common and permitted in some States, still less, practices universally permitted and deemed innocent.

Why have not some of these learned gentlemen, after months of reflection, condescended to take up the illustration so frequently presented to them, and say whether, prior to the war, Congress could lawfully have excluded from the mails matter arising out of, or endeavoring to support, the institution of slavery?

The learned counsel again asks: "If there inheres "in the very nature of government the duty to re- "pel attempts to make it the agency of crime of "the darkest dye, why does there not inhere in the "power 'to establish post offices and post roads' "a like duty to keep the mail service free "from *all* crime?" But who is to determine what is and what is not crime? This is the general office of governments clothed with full governmental powers; but such is not the character of our Federal Government. That is a government of limited powers, created for special purposes; and the question whether it has power to declare any act to be a crime, or to treat any act as a crime, must of course depend upon the inquiry what its powers are, and what the purposes are for which it was created.

Mr. Maury, in this, his latest attempt, to defend the legislation in question, makes the effort to dis-

cover whether there is not something in the exclusion of lottery matter which is really *conducive* to the legitimate *end* which Congress has authority to promote, viz., the establishment of a mail service. This effort is most pertinent and appropriate; and he is entitled to the credit of being the first upon his side to recognize it. His fertility of conjecture has resulted in this suggestion, namely, that such legislation is convenient, nay, necessary, "in order to prevent this agency of the "Federal Government from being a constant menace "and source of irritation to the States!" To what States? Certainly not to Louisiana; for the mail service as formerly conducted, was entirely satisfactory to her, and it is only this legislation which has become "a constant menace and source of "irritation to her." If Congress has the right to admit or exclude matter from the mails, according to its judgment of what will, on the whole, involve the smallest amount of *menace* and *irritation* to the States, its discretion on that subject must be final, and every disputed question of ethics or morality, every question which can arise under the police power, is thrown in upon Congress for its decision so far as its legislation may indirectly favor or disfavor the one or the other of disputed views.

The learned counsel yields to the temptation of painting the business of lotteries in the blackest colors, and seems to think he may take it as admitted by his adversaries that it can not be painted too darkly. But this is calculated only to mislead. For my own part, I have studiously avoided entering into any question as to whether lotteries are right or wrong, expedient or inexpedient, because all that is aside from the purpose. If Congress

has the right to exclude matter from the mails simply because it is immoral, or because it thinks it to be immoral, there is an end of the argument, and the legislation in question is valid. The real question is, has Congress, under the Constitution, a right to treat and condemn as immoral, and on that ground to shut out from the benefits of the mail service, a business universally understood at the time the Constitution was adopted, as lawful and innocent? For the purposes of my argument, I am obliged to concede that the business is one which the Government may deem injurious to society, and therefore, one to be prohibited; but, of course, my clients do not by any manner of means concede this, but, on the contrary, support and defend it. The decision of their own State upon this question, whatever it may be, they must yield to; but they respectfully deny the power of Congress to determine that question against them. Mr. Maury argues that Congress has, under the power to regulate commerce, authority to prevent paupers, vagrants and criminals from coming into the country; and asks why, if Congress can keep the channels of commerce clean, it can not keep the mail service clean. But can he not see that the exclusion of paupers, vagrants and criminals always was, and is necessarily, a *part* of the regulation of commerce, and the desirability of such exclusion must have been universally conceded at the time of the adoption of the Constitution, and, therefore, presumably intended to have been entrusted to Congress when the power to regulate commerce was conferred, and that this furnishes no argument whatever why it should be inferred to have been intended that Congress might interfere with the *internal* policy

of a State, and repress practices universally admitted to be innocent, or claimed by some of the people of the States to be innocent, by excluding those who are engaged in them from the benefits of the mails?

While he was reflecting upon the power to regulate commerce, and wished to draw from that an analogy, why did he not suppose the case of a permanent prohibition by Congress of the exporting of cotton to foreign countries for the sole purpose of disfavoring the institution of slavery?

Mr. Maury argues (page 6) that, the power to regulate the mails being exclusive, unless Congress has the power to exclude what may be deemed immoral from the mails, the power nowhere exists, and that there is consequently a failure *pro tanto* of one of the facilities which a government may sometimes serviceably employ. In this respect he is right; and this view seems to me to be the only one advanced in favor of this legislation which has any foundation. But let us measure the actual weight of this defect. Our argument has fully admitted the power of Congress to exclude from the benefits of the mail service all practices universally admitted to be crimes or offences at the time the Constitution was adopted. It is indeed true that society, in its progress, may come to regard as inexpedient practices which in former times have been admitted to be innocent; and it may become an object of desire to deny to such practices the benefits of the mail service. But this possibility covers but a small space, and it is therefore only to a very limited extent that the suggested failure can exist. But must it be admitted that the States themselves, armed with the whole panoply of the criminal law, can not suppress practices which are regarded as crimes? Is

exclusion from the mail service, although it may be an efficient measure of auxiliary repression, essential to repression? Certainly not. But whatever may be thought of this suggestion, it furnishes no color of support to the notion that the limitations upon Federal power, without which the Union could not have been formed, should be disregarded, and a large measure of mere police power, which was most industriously reserved to the States, be held to have been surrendered by them. Mr. Maury asks: "Is it probable that the framers of "the Constitution intended to make the power "to establish a mail service so limited as to "produce the failure of government indi- "cated"? This is the right line of argument. It points directly to the true test, viz.: whether there is any *implication* that the framers of the Constitution intended that Congress should possess a power, by indirection, over the internal affairs of the States. We answer it by asking another question, framed in similar form: Is it probable that the framers of the Constitution intended to make the power to establish a mail service so broad as to enable the general government to break down any institution, any business, any practice, then existing or carried on in the States, however essential to their interests or dear to their hearts?

As Mr. Chief Justice Story says, in Wilkinson *vs.* Leland (2 Pet., 627-657): "The people ought "not to be presumed to part with rights so vital to "their security and well-being without very strong "expressions of such intention."

The members of the convention which framed the Constitution, anxiously solicitous as they were to prevent any interference in the domestic concerns of the State, could not perceive that there was any

danger of such interference in granting to Congress the power to establish post offices and post roads. The provision passed without opposition and without discussion even. And in the great debates which ensued upon the question of the adoption of the Constitution, no objection seems to have been taken to this provision. The only observation I have been able to find respecting it, in the course of those debates, is that of Mr. Madison in the Federalist (No. 42): "The power of establishing "post roads must, in every view, be a harmless "power, and may, perhaps, by judicious manage- "ment, become productive of great public conven- "ience. Nothing which tends to facilitate inter- "course between the States can be deemed unworthy "the public care." Would this have been the course pursued in reference to this provision by the guardians of the internal concerns of the States, if they had supposed that, under this "harmless power" to establish post offices and post roads, the pretense would ever be set up that there lurked a facility which Congress might employ to break down the most cherished institutions of State policy?

Mr. Justice Story, in his Commentaries (Sec. 426) furnishes a proper answer to the argument under notice.

"VII.—On the other hand, a rule of equal im- "portance is not to enlarge the construction of a "given power beyond the fair scope of its terms "merely because the restriction is inconvenient, "impolitic or even mischievous. If it be mischiev- "ous, the power of redressing the evil lies with the "people by an exercise of the power of amendment. "If they do not choose to apply the remedy, it

" must fairly be presumed that the mischief is less " than what would arise from a further extension " of the power, or that it is the least of two evils. " Nor should it ever be lost sight of, that the gov- " ernment of the United States is one of limited " and enumerated powers, and that a departure " from the true import and sense of its powers is " *pro tanto* the establishment of a new constitu- " tion. It is doing for the people what they have " not chosen to do for themselves. It is usurping " the functions of a legislator, and deserting those " of an expounder of the law. Arguments drawn " from impolicy or inconvenience ought here to be " of no weight."

Mr. Maury observes: " It is incomprehensible " how a government, created for the promotion of " the general welfare, can be turned into an agency " for the destruction of that welfare" (page 7). This observation really embraces the view which led to the passage of the statute in question, and which is the real foundation of the argument in its support. In a certain sense undoubtedly, the Federal Government was created " for the promotion of " the general welfare," but it does not follow from this that the "general welfare" has been *committed* to it. That welfare, so far as regards the internal concerns of the States, is committed to the people of the States. It is only certain and special powers connected with that general welfare, which have been committed to the general government. There is a difficulty in the minds of many men in preserving the strict notion of a trust. If a power has been reposed in them, and they think that they perceive a particular benefit which may be accomplished by the exercise of that power, they are quite apt not to stop to in-

quire whether the power was *entrusted* to them for any such purpose. And when an opportunity is presented for uprooting a supposed vice, especially where it is not their own vice, their way of satisfying themselves that they ought to exercise whatever power they may have is to resort to rhetoric and to a painting of the terrible and wide-spread consequences which are supposed to flow from the practices in question. Men do not always think that there is room for the play of conscience in determining whether the power they hold was not conferred upon them in trust for a particular purpose only, and what that purpose was.

Mr. Maury opens another line of observation with this remark: "But it is said that if Congress "may exclude lottery matter from the mails, it may "properly exclude other matter on the pretext of "immorality. In other words, that Congress may "*abuse its power*, for it comes to just that. * * "Like the police power of the States, the police "power of the United States over the mail service "may be abused, but in all such cases the Courts "readily apply the corrective."

If the learned counsel means only to impute to me the argument that the extreme difficulty of determining where Congress must stop, if it can take any step to exclude matter from the mails on account of its supposed immoral character, is a proper ground for doubt whether the framers of the Constitution ever intended to entrust such power to Congress, no objection is taken to his observations. But his argument seems also to be to the effect that if it be allowed that Congress has the power to exclude lottery matter from the mails, it does not follow that it would have the right to exclude other matter from the mails on account of its

supposed immoral character, and that in some cases exclusion, based upon such grounds, might be an abuse of the power which the Courts could easily, and would readily, correct; but this view is very erroneous. If Congress has the right to exclude matter on the ground of its supposed moral character, it and it alone, must be the judge as to the moral character of the excluded matter. This Court certainly can not review the exercise of such discretion. It is in its nature legislative, and not judicial. It would have been extremely pertinent for Mr. Maury to point out how, if Congress were admitted to have the power in question and should *abuse* the power, "the Courts could readily apply the corrective." An effort by him in this direction will be presently noticed.

I agree that the mere circumstance that power may be *abused* is of itself no argument that the power does not *exist*. If the power really exists, the circumstance that it may be abused is wholly immaterial. But the question must not be begged. The whole controversy between us is whether this legislation excluding lotteries from the mails is itself a use or abuse of power. If Congress should pass a law excluding from the mails any matter relating to the sale of intoxicating drinks, upon what other ground could it be attacked except this, that Congress had no power to legislate in regard to the mails for the sole purpose of suppressing intemperance.

The learned counsel thinks it may help his cause somewhat if this Court could not act upon the assumption that the purpose of the law was to disfavor, and if possible, to suppress lotteries. He therefore says (page 9):

"We deny also that there is anything in section

"3894 to show that it was passed for the purpose "of suppressing lotteries, and not with the *bona* "*fide* intent to keep lottery matter out of the "mails." But this ostrich logic of hiding one's head in the sand can be to little purpose. If there is nothing in this act to show that it was passed for the purpose of disfavoring and suppressing lotteries, why argue with might and main that this purpose constitutes a perfectly good defense for the legislation? Why paint the lottery business in the blackest colors and employ the arts of rhetoric to create a conviction of its infamy and the necessity for its suppression, if it is impossible to show that Congress in enacting this law had any such purpose in view? The sage assertion that Congress passed the law "with the *bona fide* intent to keep lottery "matter out of the mails" is not denied, but the consistency of the learned counsel's notion may be tested a little better by a slight transposition of the terms in which he has stated it. Suppose he had said: "We assert that Congress enacted Section "3894, with the *bona fide* intent to keep lottery "matters out of the mails, and not for the purpose "of suppressing lotteries!" Most people would naturally enquire what Congress wanted to keep lottery matter out of the mails for.

Mr. Maury observes (p. 9). "But if the power "to pass the law excluding lottery matter be once "conceded, it makes no difference what particular "motive impelled Congress to enact it." I quite admit the truth of this observation, but beg to observe that the power to pass a law excluding lottery matter has not been, and will not be "*once conceded.*"

I thank the learned counsel for referring to the case of the Veazie Bank *vs.* Fenno (8 Wall., 533),

where this Court "upheld a law imposing a tax of "ten per cent. on the circulating notes of any per- "son, State Bank or State Banking Association, "although it was conceded that the object of the "law was not to raise revenue, but to foster and "protect the paper circulation provided by Congress "by driving out of use the circulations taxed." The learned counsel has scarcely yet referred to an authority on questions of Constitutional law which does not sustain the views of the appellants, and overthrow his own. The concession having been openly made in that case, that a tax of ten per cent. on the circulations of the State agencies could not have been imposed for any other *purpose* than that of *disfavoring* and *suppressing* them, this Court at once addressed itself to the inquiry, necessary upon that supposition, whether Congress *possessed the power* to thus destroy them, and held that it had such power. Mr. Chief Justice Chase in pronouncing the opinion of the Court said: "To the same "end Congress may restrain, by constitutional "enactment, the circulation, as money, of any "notes not issued under its own authority." This shows, in accordance with my argument throughout, that the true and only method of testing the validity of the statute in question is to inquire whether Congress has the power, either expressly, or impliedly as a necessary means for executing any express power, to suppress lotteries.

My brother Maury also observes (p. 10): "Cer- "tainly, it would have been more satisfactory if the "learned counsel had deemed it of sufficient mo- "ment to point out what language in the law he "supposed tended to show that it was not passed "in good faith." I can not point out any such language, for there is none. I do not mean to as-

sert, or imply, that the act was not passed in entire *good faith*. It was passed openly and avowedly, with no intention to deceive, for the purpose of suppressing lotteries. It was passed undoubtedly upon the assumption that Congress had the power to exclude such matter from the mails for that purpose, and the only question is whether that assumption was correct.

The learned counsel refers also to the cases of

Stone *vs.* Mississippi, 101 U. S., 814.

Beer Co. *vs.* Massachusetts, 97 U. S., 25.

Fertilizing Co. *vs.* Hyde Park, 97 U. S., 659.

Butchers' Union Co. *vs.* Crescent City Co., 111 U. S., 746.

So far as these cases have any application at all here, they support the position of the appellant, and not that of the learned counsel. They affirm that the guardianship of the public health and the public morals, in other words, the police power, belongs to the States; and that such power can not be surrendered by the States by any legislative act so as to preclude the exercise of future legislation.

Mr. Maury undertakes to point out to the Court how easy it will be to prevent the power of excluding matter from the mails, on account of its supposed immoral character, from abuse; and he lays down sundry precepts which he supposes will be clear and safe guides for the Court in determining its action. I commend this effort. It is certainly highly important, upon his view, that some intelligible and practicable rules should be laid down for the guidance of judicial action. Lest, however, I should do injustice to his precepts by describing them in my language, I must state them in his.

"Where, then, a regulation of the mail ser-
"vice is to keep that service undefiled by
"immoral matter, it will be upheld by the
"Courts. Vice and immorality can not take
"shelter behind the defences erected for the
"protection of liberty. It is in vain to invoke the
"sanctity of contracts or the inviolability of privi-
"leges or immunities, when the invocation comes
"from that direction. * * * * Can he or his
"clients feel insecure with such a barrier between
"them and legislative usurpation? Can greater
"protection be demanded against the abuse of the
"police power over the mails by Congress than is
"afforded against the abuse of the police power by
"the States"?

Here, then, we have it. This Court is to determine the validity or invalidity of legislation excluding matter from the mails on account of its supposed immoral character by determining the question whether the matter is or is not immoral. And in that determination its authority and discretion are as wide as the authority and discretion of the States in the exercise of the police power. Indeed, the power thus exercised by Congress is called by him "police power over mails." And this *police power over the mails* differs, according to him, from the police power of the States in this: that the exercise of it is subject to the review of the Courts, and subject to review also upon the same principles, and with as broad a discretion as Congress may itself exercise in enacting the laws. Whether these observations of the learned counsel will be recognized as furnishing a means for smoothing the pathway of the Court in the determination of the questions upon which, according to his view,

it may be called upon to pass, may properly be left without further observation to the Court itself.

The conclusion of my brother Maury's argument upon the question of *power* is devoted to an eloquent denunciation of lotteries—an argument, or an amusement, in which I must allow him his own way—and an assertion that "the time has come, if "it can ever come, when the lottery must be classed "as *malum in se*" (pp. 12, 13). These observations can have no pertinency unless Congress, and this Court, in reviewing its action, are in some manner vested with an authority to survey the whole field of human conduct, and compare it from time to time with those supposed standards, real or imaginary, which the general progress of civilization and the advance of human enlightenment have erected, and to assert upon such comparison the right and the duty of Congress to apply its express powers in an effort to compel, by *indirection*, a conformity to these standards. Let such observations go for what they may be worth. The time has not yet come, "if it can ever come," when the character of our Government will be revolutionized by a decision of this Court. The general power of framing legislation in order to compel a conformity between the conduct of men and the highest standards of right, can be properly lodged only in those governments which have the power to enforce that conformity by *direct* legislation.

Mr. Maury's arguments upon the other branch of the question, viz., whether the law in question abridges the liberty of the press, is somewhat brief, and might safely be allowed to pass with nothing further by way of answer than a reference to the argument of my original brief.

He makes no effort to question the accuracy of my interpretation of the language "abridging the "liberty of the press," nor of the historical argument upon which that interpretation is founded; nor does he deny that freedom of circulation is indispensable to the freedom of the press; yet he seems to deny that an absolute refusal to permit circulation by the ordinary and almost exclusive method, namely, that of the mails, is abridging the freedom of circulation. It is conceived that a conclusion so inconsequential needs no further refutation. His main resort upon this branch of the question is, like that of the learned Attorney-General, to rhetoric, in such phrases as these (p. 15): "We beg to say again that vice can not shelter "itself behind the safeguards of liberty. They "were erected for no such purpose. If the pub- "lisher of a newspaper admits into its columns "lottery advertisements, he has by his own act for- "feited his right to deposit his paper in the mails, "*volenti non fit injuria.*" I must frankly admit that I can find no short answer to this species of reasoning.

Referring to the distinction between *mala in se* and *mala prohibita*—a distinction to which he had already lent some countenance by his argument that the time had come when lotteries should be deemed to be *mala in se*—he goes back to his old position and declares "the distinction is artificial "and fanciful, and, we beg pardon for saying,

"absurd, when regarded from the standpoint of "the public good." "The public good" has been in every age, and always will be, the defense of despotism, and this Court will require that some rule more definite than this vague expression should be pointed out for its guidance.

He imputes (p. 17) to the appellant the claim of an indefeasible right to send newspapers through the mails, and denies the existence of any such right, saying: "If Congress believes "that the immense weight and volume of "the newspaper matter that is deposited in the "mails obstruct and encumber them, we doubt not "that it may exclude such matter altogether." Nor do I doubt it: and if Congress should pass a law to-morrow repealing all laws establishing the mail service, I do not know that its constitutionality could be successfully impeached in this Court. But to what purpose is it to assert that Congress has the right to legislate excluding newspaper or other matter from the mails on account of its *weight* by way of defense of a piece of legislation excluding matter from the mails, not with any purpose of facilitating the mail service, but for the sole purpose of acting upon a supposed immoral business?

Mr. Maury takes up our assertion that the law establishes a censorship, and says, by way of answer. "We understand it to be conceded that the post-"master may properly decide whether he shall re-"fuse to deliver mail matter on the ground that it "relates to *malum in se*, or is obscene; yet this "power may be perverted to curb the freedom of "the press; how, then, does it happen that the "power is properly reposed in the postmaster *as* "*to one kind of immoral matter, and not as to all?*

"If the power is not a censorship as to *murder*, "why is it such as to the *lottery*, if liability to "abuse is the test?"

I must point out to Mr. Maury that he wholly misapprehends the whole purport of my argument. I have by no means conceded that the postmaster may properly decide whether he shall refuse to deliver mail matter on the ground that it relates to *malum in se*, or is obscene. No power could be, or has in fact been, given to postmasters to make such decision. A postmaster may, indeed, refuse to deliver matter which is obscene; but it must be *in fact*, obscene. His refusal, if the matter does not bear that character, is wrongful, and he takes his action at his own peril. No authority is conferred upon him to make a decision in a doubtful case, nor is his action one way or the other pleadable in bar in the case of any judicial inquiry as to whether the matter is obscene or not.

So also, I suppose, Congress may have the right to exclude from the mail matter in aid of the commission of conceded crimes, or matter which is hostile to the Government, or a libel upon the Government, and may authorize the postmaster to refuse to deliver such matter; but the question whether the matter is in fact criminal or libellous must be left in the end, as all such questions must be left, to the decision of Court and jury. In plain cases postmasters may safely act, and in doubtful cases, if their action is in good faith, they may be indemnified by the Government, or pardoned, where refusal to deliver particular mail matter constitutes an offense; but the power of deciding questions necessarily judicial cannot be deposited with them or with any executive officer, however high; nor has it, so far as I am aware, prior to these statutes, ever

been attempted. Even the sedition laws, so much condemned, carefully avoided any such attempt. I do not mean that proper *regulations* may not be made and enforced in order to secure the mail service from the deposit of matter justly excluded.

At the bottom of page 18 my brother Maury indulges in what seems to me a singular argument. He seeks to defend the provisions of the law forbidding a postmaster to deliver newspapers containing lottery advertisements, and insists that this is necessary and proper because any effort to prevent the *mailing* of such matter would require the establishment at each receptacle of an *espionage* which he declares, would be "abhorrent to common "sense, and which our people would not tolerate." But how is this objection removed by requiring every postmaster to practice the same espionage at the *delivery* office which is so abominable at the *receiving* office?

At the close of his brief my learned brother comes to the conclusion that the appellants' notion about a censorship having been established is really so absurd that we can not treat it "with seriousness." The absurdity which is involved in the argument consists, according to him, in the assertion that the exclusion from the mails of newspapers containing lottery advertisements is censorial (p. 19). He intimates that the exclusion does not apply to matter relating to lotteries merely, and discussing the question of lotteries, if it does not amount to an advertisement of the lottery. The power which he insists the Government has is to exclude *advertisements*, while perhaps he may be disposed to concede that the exclusion of a discussion of lotteries would be an invasion of the liberty of the press. He says, "the constitutional

"guaranty against abridgment of the freedom of "the press is for the protection of *free discussion*, "and does not extend to *advertisements* of lottery "dealers soliciting business."

But who is to determine where *advertisements* end and discussion begins? Who is to say what may be printed, and what may not be printed, and what may be circulated, and what may not be circulated? The argument in the appellants' brief is devoted to the proposition that the term "freedom "of the press" means that no authority shall determine these questions except that of Court and of jury, upon regular judicial inquiry. If anything is certain, it is certain that "freedom of the press," as used in the Federal Constitution, means neither more or less than this.

The briefs upon the side of the Government have brought out with great distinctness that there are no substantial grounds upon which the statute in question can be defended except that the power to regulate the mail service embraces the power to exclude any matter from the mails which Congress in the exercise of a discretion, absolutely unreviewable, chooses to exclude, unless the exclusion is forbidden by the prohibition against abridging the liberty of the press; and, in closing this discussion, the opportunity to sum up the issues should be embraced. They are, indeed, momentous issues, which might well alarm all who have hitherto supposed that the action of the Federal Government was subjected to well defined limitations, had not this Court already, in numerous decisions, rejected the pretences which

are thus set up. They distinctly affirm the following propositions:

First.—That if an act of Congress is *in form* an *apparent* exercise of a power conferred, it must be deemed by this Court to be within the power, and that it is not competent to the Court to inquire, even by looking to its manifest object, as apparent upon the face of its provisions, and as expressly avowed, whether Congress has sought to *use* its powers for an *end* which it had no right to compass. In other words, that in respect to powers expressly granted, this Court has no right to inquire into the *purpose* for which they were entrusted with the view of limiting them to that purpose; and consequently that such powers are *subject to no limitation whatever*, unless one can be found in some positive prohibition.

Second.—That even if this Court had the right to inquire whether a particular exercise of a granted power was for a purpose for which that power was entrusted, still, if it appear that such exercise of it was for the purpose simply and solely of discouraging and suppressing some business or practice deemed immoral by Congress, and opposed to the public welfare, it is a legitimate exercise of the power; that being *one* of the purposes for which *all* its powers were granted, and that it is immaterial whether Congress has or has not any *direct* power of legislation over the business or practice, or whether the business or practice is a matter relating to the internal concerns of the States, and by the Constitution expressly reserved to the people of the States; and also immaterial whether the business or practice is a crime *per se*, or a thing

permitted by the States, or deemed by them, or some of them, an essential part of its policy, and necessary to its prosperity; in other words, that it was *intended* by the Constitution that Congress might use all the powers expressly conferred upon it, not only for accomplishing the direct objects of those powers, but of *indirectly* accomplishing other objects which were expressly reserved to the States, and that there is no limit to this exercise of power, except such as may be found in some express prohibition.

Third.—That as necessary consequences of the foregoing positions the following propositions are true:

a. That no legislation by Congress excluding matter from the mails on account of its supposed moral character, being *in form* an apparent exercise of the power of regulating the mail service is subject to impeachment on the ground that its manifest and only purpose is to disfavor and suppress in the States a business encouraged or permitted by the laws of the States, or of some of them.

b. That no legislation by Congress prohibiting the import or export of persons or commodities, being *in form* an apparent exercise of the power to regulate commerce, is subject to impeachment on the ground that its manifest and only purpose is to disfavor and suppress in the States a business encouraged or permitted by the laws of the States or of some of them.

c. That no legislation by Congress imposing

> taxes, being an apparent exercise of the power to tax, is impeachable on the ground that its manifest and only purpose is to disfavor and suppress in the States a business encouraged or permitted by the laws of the States, or of some of them.

The very statement of these propositions is a refutation of them. Their establishment would revolutionize our government and condemn as erroneous the great body of our constitutional law as this Court has declared and built it up. To suppose that the framers of our Constitution expected and intended that the internal policy and concerns of the several States which they so cautiously rescued from any *direct* control by Congress, should still be subjected to all that *indirect* control which might be exercised through the great powers of regulating the mail service, regulating commerce, and imposing taxation, if such powers should be wielded without any limitations derivable from a view of the purposes for which they were granted, is absolutely inadmissible.

One of the most deliberate judgments of this Court, to which I have heretofore, by oversight, omitted to refer, refutes each and all of these pretences. In the case of the Loan Association *vs.* Topeka (20 Wall. 655), the question arose concerning the validity of a tax imposed in direct pursuance of an Act of the Legislature of Kansas, and the question was whether the State had power to authorize such a tax. The *power* of the Legislature of Kansas to impose taxes was *absolutely unlimited* by the Constitution of the State. The question therefore was whether it is competent for the judicial

tribunals to inquire into the *purpose* for which the power to tax exists, and to limit the power to the ascertained purpose. It was held that this was the power and the duty of Courts.

The opinion pronounced by Mr. Justice Miller is an emphatic and impressive utterance of these doctrines:

First.—That neither in our national or State constitutions is there any room for the exercise of *unlimited* power; and that the powers of *each* are conferred upon them for *certain purposes only*, and are always *limited* by those *purposes*.

Second.—That where a power has been exercised, either by a State or by Congress, for a purpose other than that for which it was granted, the action is invalid and void; a *perversion* of power granted being as destitute of authority as action outside of the expressed limits of the power.

Third.—That whether a power has been exercised for a purpose other than that for which it was bestowed is a judicial question to be determined by a consideration of the act itself, and the circumstances attending its enactment.

But this determination of the Court declared no new rule. It proceeded upon principles which had long before been formulated and adopted. I have already in my original brief quoted from Marshall the rule which has ever been accepted by this Court as the one to be applied in testing the validity of Congressional enactments. I should have quoted also from the same great authority the language uttered in the same case expressive of the duty of the Court in those instances, should any

occur, in which Congress had exercised an express power for *purposes* other than those for which it was entrusted. "Should Congress, in the execution of "its power, adopt measures which are prohibited "by the Constitution; or should Congress, *under* "*the pretext of executing its powers*, pass laws for "the accomplishment of *objects not entrusted to* "*the Government*, it would become the painful "duty of this tribunal, should a case requiring "such a decision come before it, to say that such an "act was not the law of the land." (McCulloch *vs.* Maryland, 4 Wheat., 483.) Mr. Chief Justice Chase, quoting this language in Hepburn *vs.* Griswold, together with Marshall's formula upon which I have throughout so much relied, approves it as expressing the rule of action always accepted by this Court (8 Wall., 614).

The adjudications of this Court in nearly all the great constitutional causes which have engaged its attention, abound in matter corroborative of the principles upon which the petitioners stand.

In the License Tax cases (5 Wall., 463) the attempt of the Federal Government to collect taxes from persons engaged in the liquor and lottery businesses, under the form of license fees, was resisted on the ground that these occupations in the States in which the questions arose were prohibited by law. The points taken were in substance these:

1. If the licenses were intended to confer authority to prosecute the callings, they were void as being attempts by Congress to allow an occupation to be pursued which the State chose to prohibit.

2. If not intended to confer authority, then they were attempts to tax crime, that is, to participate in the fruits of crime, and were for that reason void.

The opinion of the Court pronounced by Mr. Chief Justice Chase was to the effect that they did not confer, or purport to confer, authority to carry on the prohibited pursuits. And he declared in unequivocal terms that if that were the purpose of them they could not be supported; that is to say, that the general government could not, under its power of taxation and for the purpose of collecting a revenue, interfere with the police power of the several States.

As to the second proposition, the opinion declared that the imposition of license fees, and of penalties in case of non-payment, were not taxes on crime, because Congress must be deemed to have taken no note whether they were crimes or not; that Congress looked simply to the fact that such occupations actually existed and imposed a tax on them. This opinion contains a most explicit recognition of the total absence of power in Congress, direct or indirect, either to permit or forbid the prosecution of such callings.

Let it be supposed that liquor selling and lotteries had been allowed in the States and that the license fee imposed by Congress was so large, and the penalty for non-payment so large, as to make it plainly and palpably impossible to carry on the business and pay the tax, showing the actual intention of Congress to have been to suppress the business and not to collect a revenue; just as upon like grounds it was conceded in the Veazie Bank *vs.* Fenno (8 Wall., 533) that the imposition by Congress of a tax of ten

per cent. on the circulating notes of State banking institutions was designed to effect a destruction of that circulation. It cannot be doubted that upon the principles announced in the License Tax cases the imposition would have been held to be invalid.

There has also come to my notice since the preparation of my original brief, an excellent statement, by Mr. Justice Field, giving the opinion of the Court in Soon Hing *vs.* Crowley (113 U. S., 703–710) of the precise view upon which I stand in relation to inquiries into motives of legislative enactments: "And the rule is general with reference to "the enactments of all legislative bodies that the "Courts can not inquire into the motives of the "legislators in passing them, except as they may "be disclosed on the face of the act, or inferable "from their operation, considered with reference to "the condition of the country and existing legis-"lation. The motives of the legislators, consid-"ered as the purposes they had in view, will al-"ways be presumed to accomplish that which fol-"lows as the natural and reasonable effect of their "enactments."

There are some considerations which judicial wisdom as well as practical statemanship suggests, which may fitly be pressed upon the attention of the Court. It is inherent in the nature of men that those who *hold power* should be impatient of restraints upon its exercise, and be inclined to think that any exercise of it is justifiable which the *public good* requires; and by public good, of course, their own notions of public good are intended. This is the justification of all tyrants and usurpers from Piristratus to Balamaceda. And it is equally the pretence of majorities in a republic, whether of voters or of representative legislators. This dispo-

sition was well known to the great minds who framed our Federal system. Their main design was to preserve the autonomy of the States in respect to all internal concerns, and at the same time to create a general government clothed with the vast powers of controlling those concerns which no State or States could control for the others. In making the division and distribution of powers in accordance with this design they supposed that the *police power* had been effectually reserved to the people of the States so far as human language expressive of intent could make the reservation.

The guaranty which they provided for the security of the division and distribution established by them was the creation of a judicial tribunal which should stand apart, free from the storm of passion and interest, and declare to present and future times what their true intention was. Had they supposed that that tribunal would give heed to suggestions that power bestowed upon the general government was so bestowed that it might be wielded for any purpose which might be accomplished by it directly or *indirectly*, they would have scorned to engage in the vain office of making limitations of power by a paper constitution which was to be submitted to such interpreters. They had that faith in human nature which their own characters justified, and which, happily, has not as yet been disappointed.

If it is wise that lotteries should be suppressed, and public opinion calls for such action, it is undeniable that the police power of the States is amply sufficient for the purpose. In most of the States—perhaps in nearly all—they have been suppressed by the exercise of that power, excepting those instances of occasional transgression, mostly in

cases of religious and charitable enterprises—purposes which are sometimes supposed to take from the practice that enormity otherwise imputed to it. The exact situation is that Louisiana, and perhaps some other States, have not as yet concurred in this method of treatment; and inasmuch as the zealous advocates of repression cannot exercise the police power of that State, they have sought to avail themselves of *another police power* over the subject, namely, what my brother Maury calls the "*police power of Congress over the mails*"! In short, the precise character of the effort is *to defeat the opinion and determination of Louisiana* in reference to the exercise of her *police power*.

The question is whether Congress can, under the Constitution, enact a law for this single purpose. If it can make such a use of its power to establish post offices and post roads, it can make a like use of its power to regulate commerce with foreign nations and between the several States, and of its power of taxation, and all other powers. A question more momentous was never submitted to this tribunal. If the general government can so exercise its powers, it is idle to suppose that it will refrain. And the force of such exercise would be so prodigious that no State institution, or interest or policy could stand against it. No such notion of consolidated and concentrated power has heretofore been imagined.

The Slaughter House cases raised a question which the Court approached with unwonted apprehension and awe. But that question went only to this extent, namely, whether those fundamental rights which the Constitution always protected when asserted by a citizen of one State against the action of another State, were, by

the Fourteenth Amendment, so secured to all citizens of the United States that a citizen could invoke for them the protection of Federal authority against an exercise of the police power by *his own State*. There were most weighty arguments to which four of the learned Judges yielded, that such was the intent of the Fourteenth Amendment. But the majority were so impressed with the conviction that this would be a prodigious invasion of the power of the States over their internal concerns, and that the preservation of that police power was one of the prime and essential objects sought to be secured by the framers of the Constitution, that they were unwilling to believe, in the absence of express and unequivocal language, that the Amendment was designed to so abridge that power. With what feelings must this Court meet the assertion of a far more momentous claim—a claim that the *original design* of the Constitution was to subject the police power of the States to the effects of the exercise by Congress of all its vast powers, not for the limited objects for which those powers purport to have been granted, but for any and every object which may be *indirectly* reached by their exercise, and which Congress, in the exercise of an unlimited authority to determine what pursuits in life are right or wrong, criminal or innocent, expedient or inexpedient, may deem fit?

And, when it is borne in mind that if the *legislative* power of the Union can be thus wielded to affect, by indirection, the internal concerns of a State, a like use can be made of the *executive* power, what State institution or interest could withstand a combined attack from both of these instrumentalities?

Our great President, Abraham Lincoln, the first

among his contemporaries for political insight and rigid sense of official duty, has stated with a clearness which will never be excelled, how, and under what circumstances, the Chief Executive Magistrate may indulge his own views of what is moral or immoral in wielding the vast powers entrusted to him. His rule is just as applicable to legislative as to executive power.

In a letter to a dissatisfied fellow-citizen, he draws the distinction between an interference by the Executive, *in ordinary administration*, with those internal concerns which the Constitution reserves to the States, and such interference, when compelled by *dire necessity* in the prosecution of *war* for the defense of the existence of the nation. In *ordinary administration* he would tolerate no such interference in the slightest degree. At the same time, the maxim *silent leges inter arma* is a sound one; and he would not surrender the whole Union and the whole Constitution for the purpose of preserving one of its features. Let his words stand for an answer to those who, clothed with vast powers in trust for certain purposes, think to pervert them to objects sacredly reserved to other control.

"To A. G. HODGES,

"Frankfort, Ky:

"I am naturally anti-slavery. If slavery is not "wrong, nothing is wrong. I can not remember "when I did not so think and feel, yet I have "never understood that the Presidency conferred "upon me an unrestricted right to act officially "upon this judgment and feeling. It was in the "oath I took that I would, to the best of my ability, "preserve, protect and defend the Constitution of

"the United States. I could not take the office with-
"out taking the oath. Nor was it my view that I
"might take an oath to get power, and break the
"oath in using power. I understood that in
"ordinary civil administration this oath even for-
"bade me to practically indulge my primary,
"abstract judgment on the moral question of
"slavery. I had publicly declared this many
"times and in many ways, and I aver that, to this
"day, I have done no official act in mere deference
"to my abstract judgment and feeling on the
"same. I did understand, however, that my oath
"to preserve the Constitution to the best of my
"ability imposed upon me the duty of preserving,
"by every indispensable means, that government—
"that nation, of which that Constitution was
"the organic law. Was it possible to lose the
"nation, and yet preserve the Constitution? By
"general law, life and limb must be protected, yet
"often a limb must be amputated to save life; but
"a life is never wisely given to save a limb. I felt
"that measures, otherwise unconstitutional, might
"become lawful by becoming indispensable to the
"preservation of the Constitution through the
"preservation of the nation. Right or wrong, I
"assumed this ground, and now avow it. I could
"not feel that, to the best of my ability, I had
"even tried to preserve the Constitution if, to save
"slavery or any minor matter, I should permit the
"wreck of government, country and constitution
"all together." * * * * * * * * * * *

Life of Abraham Lincoln (Nicolay and Hay), Vol. 6, pp. 430-431.

JAMES C. CARTER,
Of Counsel for Petitioners.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 12, ORIGINAL. EX PARTE JOHN L. RAPIER.

No. 13, ORIGINAL. EX PARTE GEORGE W. DUPRE.

No. 14, ORIGINAL. EX PARTE GEORGE W. DUPRE.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1890.

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No. 14, ORIGINAL. EX PARTE GEORGE W. DUPRE.

BRIEF FOR THE UNITED STATES.

These cases are applications for writs of habeas corpus and certiorari.

The petitioners are under prosecution for alleged violations of the laws prohibiting the use of the mails for the purposes of lotteries.

The petitioner, Rapier (No. 12), was proceeded against by information in the United States district court for the southern district of Alabama for having deposited in the mail a newspaper containing an advertisement about a lottery.

The other petitioner, Dupre (Nos. 13 and 14), was proceeded against by indictment (No. 13) in the United States

circuit court for the eastern district of Louisiana for having deposited in the mail a newspaper containing an advertisement about a lottery, and by indictment (No. 14) in the same court for illegally depositing in the mail a letter concerning a lottery.

Each of the petitioners is in the custody of a United States marshal in consequence of the said proceedings, and claims to be held without authority of law.

The three applications may be discussed together, as they all turn on section 3894, Revised Statutes, as amended by the act of September 19, 1890 (Pamph. Laws 1889–1890, p. 465), which section, as amended, is as follows:

> SEC. 3894. No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

The questions involved in the three cases are believed to be no longer open in this court (*Ex parte Jackson*, 96 U. S., 727), but being invited to a rediscussion of the whole subject we do not decline the invitation.

THE POWER "TO ESTABLISH POST-OFFICES AND POST-ROADS."

The Constitution declares that "the Congress shall have power * * * to establish post-offices and post-roads" * * * (Art. I, Sec. 8).

These words, it is important to note, convey a power, not to regulate something already existing independently of the Constitution, like the power to regulate commerce, but a power to *create* and, if to create, to maintain a postal service.

The distinction pointed out is *fundamental* in this argument. The failure to observe it runs through the discussion on the other side.

It can hardly require argument to show that the power to "*establish*" a postal service is a power to create such service. Like the power "to *establish* an uniform rule of naturalization" the power to "*establish*" a postal service is a power to make and shape such service according to the will of Congress.

How far this power "to establish post-offices and post-roads" is subject to other provisions of the Constitution is a matter for after consideration. For the present we confine ourselves to the argument, so earnestly pressed for the petitioners, that the legislation now in question is void, because not necessary and proper for carrying into execution this power to establish post-offices and post-roads.

But we must know precisely from the Constitution itself *what sort of a postal service was contemplated* before we can apply the test that the laws in question are not necessary and proper for carrying out the power to establish that service. But the Constitution is purposely silent on the subject. Knowing, as its framers did, that intercourse by post was then in its infancy, and therefore should be provided for in the Constitution in such a way as to be most favorable to its development, the power to create such a system was committed to Congress without reservation or qualification. Nor is there, as supposed, any analogy between this case and *United States* v. *Fox* (95 U. S., 670), because that case turned on the power of Congress to make bankrupt laws, and the known established character of laws of that kind enabled this court to say whether the law in question had a proper connection with the subject of bankruptcy as defined by the law of England.

So far, then, as the terms of the power are concerned there is no limitation whatever on the will of Congress; and if no limitation on the will of Congress, there is no possible ground on which we can argue that the laws of Congress creating a postal service are not necessary and proper for carrying out the power "to establish post-offices and post-roads." The Constitution leaves us, and purposely leaves us, without a touchstone by which to try the validity of any postal system that Congress may in good faith devise, which shows clearly that no judicial question of that kind can ever be properly raised. The whole subject is one of legislative discretion, like the police

power of the several States or the power "to provide and maintain a navy," or the power "to raise and support armies," or the power "to promote the progress of science and useful arts," or the power "to constitute tribunals inferior to the Supreme Court," or "the power to coin money," and "fix the standard of weights and measures," etc., powers with which the courts can not intermeddle, except to prevent perversion and abuse.

Assuming, however, for a moment, the correctness of the opposite contention, that legislation establishing a postal service must be strictly confined to laws necessary and proper for the mere carrying and distribution of the mails and nothing else whatever, and that laws excluding from the mails matter relating to lotteries are not necessary and proper to the purposes mentioned, what are we to say as to the legislation granting the franking privilege to certain individuals? Laws of this kind have been in force ever since the present Government was established, and it would seem that their validity can not be questioned at this late day. But, tried by the standard set up on the other side, which, we take leave to say, is strict construction run into the ground, these franking-privilege laws are void, because not necessary and proper for carrying out any power contained in the Constitution.

But do not these franking-privilege laws show that Congress has never, from the beginning down, recognized any such limitation on its powers as is now contended for?

More than a century of acquiescence of the people of the United States in a construction of the Constitution which proceeds on the opposite idea, that the discretion of

Congress is absolute under the power to establish a postal system, *is binding on the courts*, as this court expressly ruled with reference to the power conferred by Congress on the Secretary of the Treasury to remit penalties and forfeitures incurred under the revenue laws, and as it had before ruled in other cases. (*The Laura*, 114 U. S., 411, 416. See also *Auffmordt* v. *Hedden*, 137 U. S., 310, 329, and cases cited.)

By the act of February 20, 1792 (1 Stat., 232), entitled "An act to establish the post-office and post-roads within the United States," it was provided (§ 21) "that every printer of newspapers may send one paper to each and every other printer of newspapers within the United States free of postage, under such regulations as the Postmaster-General shall provide."

Tried by the test which is applied by the petitioners' counsel to the legislation now in question, the law referred to was without any validity under the Constitution, because not necessary and proper for the carrying out of any granted power.

It is of no small significance that this act was the work of the Second Congress under the present Constitution, some of whose members had sat in the convention that framed that instrument.

It is furthermore to be remarked that President Monroe, who was anything but a latitudinarian expounder of the Constitution, approved the act of March 2, 1827 (4 Stat., 238), giving the franking privilege to the Commissioners of the Navy Board and others. In his message of May 4, 1822, Mr. Monroe indulges in an extended discussion

of the grant "to establish post-offices and post-roads." (See 2 Story, Constitution, § 1129, note 2.) The subject was one to which he had evidently given great consideration, and the weight of his approval of the act of 1827 is enhanced by the fact that in his message of 1822 he says, flying in the face of *McCulloch* v. *Maryland*, decided in 1819, that "whatever is *absolutely necessary* to the accomplishment of the object of the grant [to establish post-offices and post-roads], though not specified, *may be fairly considered as included in it.*" And this advocate of strict construction regarded a law granting the franking privilege as within the power "to establish post-offices and post-roads!"

That the right to the mail is just what Congress chooses to give and no more is evident. No one can deny that Congress has power to say what shall be mail matter and what shall not. If Congress deemed it advisable to exclude newspapers from the mails, on any terms, might it not do so? Might it not exclude merchandise altogether?

If, then, Congress might exclude newspapers absolutely, may it not admit them on any terms it deems reasonable? It was upon this principle that Congress passed the act of March, 3, 1845 (5 Stat., 733), separating newspapers from letters as mail matter, with a view to expedition in the transportation of the latter; but the country did not take fire then, any more than now, at this *abridgment of the liberty of the press!*

The right to use the mails is not a right conferred by the law of nature. It does not exist outside the Constitution, like the rights to engage in commerce or pursue

happiness. On the contrary, it derives *its whole being* from that instrument and the action of Congress under it. It was, therefore, perfectly competent for that instrument to make the right to use the mails entirely subject to the will of Congress. The Constitution emanated directly from the people, who were untrammeled by limitations of any sort, except, perhaps, what the Deity himself has imposed. Whether or not the right to send newspapers through the mails is a limitation of the latter kind is, perhaps, left in doubt by the discussion on the other side.

The framers of our great covenant of government thought that the right to create and organize a mail service, like the right to lay taxes, might be left with the representatives of the people, without specific directions. The whole subject is safe in their hands, and the people will be quick enough to take alarm at the first approach of danger, without listening for the slogan of this *new sentinel of liberty*, the Louisiana Lottery Company. God save the mark!

The importance of the discussion is deemed to be enhanced by the claim that the power conferred on Congress "to establish post-offices and post-roads" is coupled with an imperative duty to exercise it; and that if Congress had omitted to do so it would have been guilty of a violation of the Constitution.

We can not accede to this argument. We do not believe that the power in question belongs to that class of vital powers which must be set in operation or the plan of the Constitution would fail, but that it belongs to a well-recognized class of powers which Congress may ex-

ercise or not at pleasure, like, for example, the powers to pass bankrupt and naturalization laws. We do not conceive that there can be a serious question about the right of Congress to abolish the entire postal service and leave the correspondence and newspapers of the country to be transported by those who fetch and carry for its commerce. Indeed, when the community has, in the past, been scandalized by some abuse in the administration of the postal service, the public attention has been directed to the inquiry whether the remunerative part of that service, at least, would not be better performed by the common carriers of the country.

If ,then, Congress may *abolish* the whole postal system, is it too great a stride in the argument to say that what it may abolish it may require to exist on such terms as it may choose to prescribe, in accordance with the principle that the exercise of a power to prohibit a thing need not be absolute in order to have validity? (*The Passenger Cases*, 7 How., 468 per Taney, C. J.)

We deny that one of the direct objects of the legislation assailed is to disfavor or suppress lotteries. The direct and only object to which Congress looks is the purging of the mails; all the rest is indirect and consequential.

It is difficult to help exhibiting some impatience with an argument which insists that there is no power in this Government to prevent itself from being made an agency in promoting one of the most pestilent and demoralizing practices that exists.

The Government of the United States was established

for the purpose, among others, of promoting "*the general welfare*" of all the States, yet so circumscribed are the powers of Congress, we are told, that if one of the States of this Union chooses to legalize lotteries all the other States must be subjected to the will of that one State, and neither they nor Congress have the power to prevent the post-roads of the United States from being made the conduits for a commerce in lottery tickets between that one State and the people of all the other States. Thus the general welfare of the Union is sacrificed to the misguided will of one State.

There is something so appalling in this contention that argument seems unnecessary to show its unsoundness. Said Mr. Justice Grier in *Phalen* v. *Virginia* (8 How., 163, 168):

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor, and it plunders the ignorant and simple.

But we are gravely told that every community in this Union must continue to be infested with this "widespread pestilence of lotteries;" must submit to its demoralization as one of the conditions of being under the supreme law of a Constitution that professes to have been formed *to provide for the common defense, and to promote the general welfare.*

Was ever anything more unwarranted than the argument that because Congress exercises this police power over the mails, denying their privileges to persons engaged in plainly immoral practices, it is usurping power?

In *Stone* v. *Mississippi* (101 U. S., 814) this court held that a charter to a lottery company was not protected by the contract clause of the Constitution, but the argument here is that to close the mails to a lottery company and its aiders and abettors is *a violation of fundamental rights.*

The argument that Congress can not exercise this police power over the mails because it might abuse the power, could be used to the destruction of every implied power, and, as Mr. Justice Washington said, in *Worcester* v. *Georgia* (6 Pet., 572), "would go to the destruction of all governments." Such an argument would overthrow the police power of the States whose only limitation is good faith.

The simple question in this case is whether Congress has legislated in good faith or has, under the pretense of exerting its police power, attempted to invade the fundamental rights of the citizen. This is the standard by which this court determines the validity of State laws which are claimed to be a valid exercise of the police power.

The Congress, no more than the States, can *abuse* its power. It can not, on the pretense of providing a postal system, take away the guaranteed rights of the people, among which guaranteed rights, however, is not the right to use the mails for a commerce in lottery tickets.

It is of no small significance in this discussion that the learned counsel for the petitioners have been driven to acknowledge that Congress has the right to purge the mails of matter relating to offenses which are *mala in se*,

while they contend it has no such right as to offenses that are *mala prohibita.* Legislation for the exclusion of the latter, *mala prohibita*, we are told, has not the quality of necessity or propriety, required under the Constitution to give it validity as the exercise of an implied power, while legislation for the exclusion of the former, *mala in se, has that quality.*

This fanciful and fine-spun distinction between the offenses as to which the indispensable police power of Congress over the mails extends and those to which it does not is thought to find justification in the notion that a duty to observe the great and universally recognized principles of morality must be presumed to enter into every organization for the purposes of government as a part of the law of its being and as a condition of the exercise of every power, but that no such duty exists as to a notional and factitious morality—*mala prohibita.*

This looks something like a surrender of the argument, for if the police power of Congress over the mails, as contended for on the other side, must stand on such an unreal, artificial distinction, we see no more cogent reason to be found for this court's rejecting that contention and saying that it will adopt that interpretation of the Constitution which gives Congress the right to cleanse the mail service OF THE ONLY KIND OF CRIME THAT REALLY INFESTS IT, we mean the offenses called *mala prohibita.* It is these offenses that young and old, high and low, rich and poor, are prone to indulge in, and their corrupting and destructive influence is due to the very fact that their commission does not excite the horror or cause the disgrace

which usually follow the perpetration of the great crimes It is this that renders the Louisiana Lottery Company more terrible in its effects throughout the land than a pestilence. Its seductive advertisements, with their successful appeals to the restless, gambling spirit of the times, *which taints every occupation*, the flattering hope of sudden riches that it excites, are influences in the presence of which the honesty of many a weary, struggling soul is sacrificed to the delusive hope of being lifted out of its misery by drawing a prize in the Louisiana Lottery.

But we are told that this corrupting influence, together with the newspapers that may choose to be its accessories, has the *constitutional right* to use the mails without restriction, and, as a consequence, carry vice into every household in the land.

The police power of the States has no limitation except *its abuse*, which this court instantly corrects; why then, in the face of the alarming contention for the petitioners, may it not be properly held that the Constitution intended to place no limit on the power "to establish post-offices and post-roads" except *its abuse*, which the courts are at hand to remedy? Certainly this seems much better than to adopt the other view and make *a sacrifice of the general welfare* of all the States to the Louisiana Lottery Company.

If Congress may be trusted with the unlimited power of taxation, surely it may be trusted with this ample power to regulate the mails, under the correction of the courts and juries of the land.

Upon the ground that the well-being of every State

requires that its legislature should have power to prevent the doing of things which may *tend*, even, to be harmful to the public morals, we maintain that there exists in Congress a similar authority over the mails. This is so of necessity, and, like the police power of the States, this power of exclusion from the mails extends to all sorts and descriptions of offenses, including everything under the head of *mala prohibita*, for, otherwise, as we have said, the power of exclusion would be practically worthless, as men do not have much mail communication in the commission of great crimes, whereas the mails are laden down with matter relating to lotteries and other descriptions of *mala prohibita*.

It is not to be denied that lotteries have had the countenance and patronage of some of the best and purest men; but it by no means follows that a thing which suited the community at one time must be good for it ever afterwards. Slavery and polygamy have, it is said, their proper places in the evolution of human society; but that is no reason why they should be maintained now, when they are become great evils.

The gambling spirit that pervades society in this country is the direct product of the late war. The suddenness with which men waxed rich and powerful, in all directions, during that period engendered everywhere a greed for riches; a greed which had no patience with the slow, but sure, processes of legitimate business, as carried on before the war. This feverish desire to leap into wealth by one gambling process or another, and not by patient, honest labor, is the evil condition in which the lottery flour-

ishes. It fans the flame of that discontent with honest labor which is making shipwreck of character all the time and in every part of the country.

Whatever good, then, lotteries may be claimed to have done in the past, the present condition of society makes them a gigantic evil, and demands that they shall be stamped out and, to that end, that the exercise of the powers of the States, *reserved to themselves for the protection of the morals of their people*, shall not be defeated by allowing the Louisiana Lottery Company to carry its demoralization into every nook and corner of the land, through the mail service provided by the very government that was founded to promote *the general welfare* of the people of all the States. The States of this Union did not place the mail service in the hands of the Federal Government to be made an engine for the corruption of the morals of their people, and they have a right to demand that it shall not be put to any such use, without stopping to inquire whether the demoralizing agencies claiming the freedom of the mails belong to the class of *mala in se* or *mala prohibita;* a distinction in crime which the people of the States may naturally be expected to have no patience with, suggesting, as it does, a failure of government, state and federal, in a vital particular.

THE FREEDOM OF THE PRESS.

If the preceding argument is sound, the fine and instructive discussion of the development of the law of libel by the counsel on the other side has no particular application here.

Nobody complains that the law excluding the news-

papers in question from the mails is leveled at discussions in them of any kind or on any subject. The whole complaint is that they were treated as unmailable matter because they contained lottery advertisements. The freedom that has been invaded is the freedom of the press to advertise crime and immorality.

It must be admitted that newspapers of all kinds might be excluded from the mails. That they have so long enjoyed the privilege of that service is no reason for saying that the privilege is irrevocable. As well might it be said that Congress could not exclude merchandise from the mails on a similar ground.

If Congress should find that the introduction of newspapers into the mails increased the weight and bulk of the latter too much, we think Congress could exclude them and leave them to be circulated through the channels of commerce.

The right to circulate what emanates from the press is no doubt essential to its freedom, but we must confess that we do not appreciate the argument by which it is sought to show that the exclusion of newspapers from the mails, which constitute but one means of circulation, is an *abridgment* of the freedom of the press, all other means of circulation being left open to them.

The Constitution says "the right of the people to keep and bear arms shall not be infringed" (second amendment), but it is no infringement of this guaranty to pass laws making it criminal to carry concealed weapons.

Is the right to bear arms any less sacred than the right of the press to be free? Indeed, is not the former of *more*

importance to the liberty of the people than the latter? How, then, is it that the one, and the *more important one*, may be protected against abuse by legislation while the other is allowed to be "a chartered libertine," superior to legislative restraint?

A newspaper containing obscene advertisements may be excluded from the mails. This is conceded, if we are not much at fault. But the lottery being a sin that comes by the law, only, matter relating to it can not be excluded from the mails because the police power of Congress *does not go that far!* This view would bring our Federal polity into contempt, and painfully suggests the impotency of the old Confederation.

But how does it come about that the police power of Congress can be extended to the right to bear arms without putting that right in peril, yet can not be extended to the use of the mails by the press without abridging its freedom? Another analogy may be found in laws making criminal certain abuses of the freedom of speech.

As we have seen, Congress, by the act of March 3, 1845 (*supra*), separated the letter mail from the other mail, with a view to expediting the transportation of the former, but the press did not complain of any abridgment of its freedom, then. It submitted to the slower service without raising the cry that the Palladium of liberty was in danger.

That a law forbidding the mails to newspapers and letters relating to lotteries is a valid exercise of the police power of Congress over the mails is, we submit, per-

fectly clear, and is made all the more so, to our minds, by the labored attempt of the other side to show that the police power of Congress over the mails can not be extended to the offenses that most infest them.

In submitting this brief the undersigned takes leave to say that he has been called upon to prepare these cases for the Government at so short notice as to leave him little time for reflection and none for research. He therefore bespeaks the indulgence of the Court and the learned counsel for the petitioners.

WM. A. MAURY,
Assistant Attorney-General.

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In the Supreme Court of the United States.

No. 8, ORIGINAL.

Ex Parte GEORGE W. DUPRE.

No. 9, ORIGINAL.

Ex Parte GEORGE W. DUPRE.

Supplementary Note to Mr. Carter's Brief.

An examination of the brief of the petitioner in *Ex parte* Jackson (96 U. S. 727) furnishes support to the suggestion that the main propositions advanced in my brief in the above-entitled causes were not to any considerable extent, if at all, laid before the court upon the argument in that case.

The brief of Messers Dittenhofer & Post contained a very elaborate history of the postal system from its origin; and its principal purpose was to show that by the power to

establish post offices and post roads an exclusive power was intended to establish a mail service, such as that service was understood to be at the time of the adoption of the Constitution; that this service always embraced the carriage of *letters and packets*, and that the power was in effect a constitutional *grant* to the people of such mail facilities, which Congress could not by legislation take away.

I do not mean to intimate that this view is irrelevant, unfounded, or unimportant. On the contrary, I have, in a different form, urged it in my brief; but it is not the main ground upon which the petititioners' case is put.

Upon this brief in *Ex parte* Jackson, and its bearings upon the nature of the discussion and decision in that case, the following observations are respectfully submitted:

First. The line of argument pursued in the brief of the undersigned, designed to show that Congress *had no power* to exclude lottery matter from the mails, was not even suggested. The point was not taken that the express powers of Congress are limited in their exercise to the *purposes* for which they were entrusted, and that in order to justify Congress in exercising any incidental or implied power to carry into effect its express authority, it must appear that there is *some relation* between the means employed and the legitimate end. Nor were any of the long array of authorities cited in the briefs in the cases now before the court referred to in this brief in *Ex parte* Jackson.

The naked point that Congress did not possess the power in question seems indeed to have been in some manner suggested, probably through the reference to the discussions in the Senate in 1836, but the mere presentation of the point, without the *line of argument* which supports it, and *without the authorities* bearing upon it, must be admitted to be ill-calculated to induce proper consideration.

Second. The point of want of power was indeed passed upon in the opinion; but, it being undeniable that Congress had the power to *regulate* the mail service, and to *exclude* matter where this was proper for the purpose of regulation, and no argument having been offered to show that while Congress could exclude for the purpose of making the mail service more efficient, it could not do so in order merely to suppress a supposed immoral practice within the States, it is not to be wondered at that the court should have accepted a conclusion, not impeached by argument, that Congress had a power to exclude such matter as in its discretion it thought fit. We may be sure that had the line of argument now pressed upon the court been presented in *Ex parte* Jackson it would not have been overruled without deliberate consideration.

Third. There is, indeed, in the cases now before the court, and upon the point of more power, a question presented, which, so far as the undersigned is aware, has never

before engaged its attention. This is whether—it being conceded that Congress may so shape the exercise of its express powers as to disfavor crimes which are *mala in se*—it can go further and use those powers solely for the indirect purpose of suppressing practices within the States which it chooses to view as immoral, when it has no power to directly punish them as crimes, and when the direct control over such practices is carefully reserved to the States. This question might have been raised in *Ex parte* Jackson, but was not. It is believed that the court will readily assent to the view that the present cases cannot be decided without a careful consideration of this question.

Fourth. Upon the other branch of the argument—that relating to the Freedom of the Press—similar observations are to be made. The court appears to have been furnished with no views upon this point in *Ex parte* Jackson, except such as may be found in Mr. Calhoun's report, and the discussions in the Senate in 1836.

No attempt was made to show by reference to the long struggle in Great Britain between the partisans of arbitrary and of popular government what the true meaning of the words "Liberty of the Press" was. Nor was any attempt made to show that the statutes excluding lottery matter really attempted to make *new legislative definitions* of what may not be published.

The absence of argument, and even of suggestion, upon these points, together with the like absence of any suggested line of discrimination between acts which Congress

might disfavor by exclusion from the mails, and those which it might not, left the court in a very unsatisfactory condition for the determination of such a controversy. It is quite evident that it felt the pressure of the consideration that if it held, upon either ground, that the law excluding lottery matter was invalid, the law excluding obscene books and pictures must also fall.

In this state of the argument the conclusion seems to have been accepted that so long as a man has any means of circulating a publication left open to him, even though that means is the feeble and imperfect one of sending his publications as *merchandise* by his own enterprise, or the enterprise of other private carriers, the *freedom of circulation* is *not abridged;* that before that freedom can be abridged *all* means of circulation must be prohibited. This *seems* to be a conclusion that the freedom of the press cannot be abridged unless it is destroyed.

The undersigned cannot help thinking that the freedom of *circulation*, which is admitted to be synonymous with the freedom of *publication*, is *abridged* when the *ordinary*, *principal* and only *adequate* method of circulation is taken away; and that the court will now willingly give to this subject, possessing as it does a transcendent importance, a deliberate reconsideration unembarrassed by the opinion in *Ex parte* Jackson.

JAMES C. CARTER,
Of Counsel for Petitioners.

Office Supreme Court U. S.
FILED.
APR 13 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

IN THE MATTER OF THE PETITION

OF

GEORGE W. DUPRE.

No. 13 ORIGINAL.

BRIEF FOR PETITIONER.

JAMES C. CARTER,

Of Counsel, for Petitioner.

Albert B. King, Printer, 89 William Street, N. Y.

Supreme Court of the United States.

In the Matter *of* The Petition of GEORGE W. DUPRE.	Number 13. Original.

The petitioner was indicted on the 19th day of February, 1891, in the Circuit Court of the United States for the Eastern District of Louisiana for mailing a newspaper containing an advertisement of a lottery, contrary to the provisions of section 3894 of the Revised Statutes of the United States. He demurred to the indictment, and his demurrer was upon argument overruled, and he was ordered to plead thereto; and was thereupon surrendered by his bail and committed to the custody of the United States Marshal, to be held until discharged in due course of law.

He thereupon filed his petition in this Court praying for a *habeas corpus* and *certiorari* to the end, that he might be discharged from his imprisonment. The ground of his petition is that the statute under which he was indicted is unconstitutional and void.

The Statute of September 1st, 1890, under which he was indicted, amended the former provisions of law concerning the sending by mail of matter relating to lotteries, and is as follows:

AN ACT to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section thirty-eight hundred and ninety-four of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 3894. No letter, postal-card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal-note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter-carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for

not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful pnblication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

SEC. 2. That section thirty-nine hundred and twenty-nine of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails, by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmas er-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open

any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself."

SEC. 3. That section four thousand and forty-one of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money-orders, drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual, or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertising by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal

money orders to any other persons, firm, bank, corporation, or association named therein, shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way."

Approved, September 19, 1890.

First Point.—The power of Congress is limited in two ways. *First*, it can exercise no power which has not been conferred upon it by the constitution. *Second*, it cannot exercise the powers which have been thus bestowed in ways, or for purposes, which the Constitution forbids.

Our first proposition is that the statute in question (R. S., Sec. 3894) is invalid, as being an attempt to exercise power *not conferred* upon Congress.

I.—It is not denied that Congress, in the exercise of the power conferred upon it by the Constitution "to establish post-offices and post-roads is clothed with the full incidental power of *regulating* such offices and roads;—in other words, of *regulating* the mail service. Nor is it denied that this incidental power of *regulation* embraces the power of so *limiting* the carriage of matter by mail as to render that service practicable; and consequently embraces a power of *excluding* matter from the mails for *that* purpose and to *that* extent.

What we do assert is that any *incidental* powers which Congress may thus exercise must be such only as, in the language of the Constitution, "are necessary and proper" for carrying into execution a general power expressly conferred; and that whether any such incidental power is "necessary and proper" must be, as this Court has always regarded it, a *judicial* question.

1. The last above stated proposition was early settled by one of the most celebrated judgments of Marshall. No *express* power had been bestowed upon Congress to create a bank. Whether that body possessed it as an *incident* was the main question. That great Judge discarding the view that any rigorous interpretation was to be placed upon the term "*necessary*," but at the same time insisting that the means resorted to in the attempted execution of an *express* power should be such as might reasonably be supposed to conduce to that end, drew up the formula which should guide the judicial inquiry in language which has never been found to need amendment: "Let the end be legitimate, let "it be within the scope of the Constitution, and "all means which are appropriate, which are "plainly adapted to that end, which are not "prohibited, but consist with the letter and "spirit of the Constitution, are constitutional."

McCulloch *vs.* The State of Maryland, 12 Wheat., 316, 420.

a. This doctrine, indeed, is not peculiar to the interpretation of the Federal Constitution. It is, like so many of the teachings of its author, a precept of general wisdom, applicable alike in all inquiries concerning the validity of the acts of any legislative body, or municipal corporation, and, we might almost say, of any *agent*. It is the daily guide of this Court.

2. In applying this doctrine, while we are not permitted to inquire by means of *facts given in evidence*, into the motives of individual legislators, we are permitted and enjoined to ascertain the *purpose*, so far as it is manifest upon the face of the legislation, or inferable from its necessary effects.

Minnesota *vs.* Barber, 136 U. S., 313.

3. The first form which the judicial inquiry assumes is, whether the *means* employed by Congress in executing its admitted powers are *appropriate*, and apparently *conducive* to the legitimate end. If they are so, it matters not whether or not they are the best and most effective means. Congress may fail in the effort to select these. But they must be *means;* in other words they must have *some* relation to the end—*some tendency* to accomplish it. Applying this test the statute in question is plainly invalid. This seems scarcely to admit of debate.

a. The legitimate *end* is to furnish mail facilities to the people of the United States; and this means to *all* the people of the United States. No argument will be expected from us to show that the power thus bestowed upon Congress was not one to furnish mail facilities to such persons as Congress might, from caprice, or favor, or any *arbitrary* motive, choose to grant them.

There are many regulations in various acts of Congress designed and adapted to make the mail service practicable, useful and convenient. They relate to the *material* nature and weight of the matter to be carried, the grading of it into classes, the prescribing of rates of postage, the exclusion of explosive or other matter injurious to persons, or to the other matter for which the mail service is principally designed. The relation of these provisions to the main purpose is plain.

b. But the statute in question makes the *moral character* of the matter the sole ground of exclusion. There can be—there is, indeed,—no pretence that the exclusion of matter upon this ground is in any manner *conducive* to the mere end of establishing and maintaining a mail service.

c. The fact that the mail service has been established and maintained for a century with-

out any such exclusion would be sufficient to show this. But argument is quite superfluous when no one ever has, or does, pretend to the contrary.

d. The attempt in 1836 to procure the enactment of a law to prevent the *delivery* from the post offices of alleged incendiary publications on the subject of slavery called forth an earnest debate in the U. S. Senate. Webster at once seized upon the essential vice of such legislation. He declared "that Congress had not "the power, *drawn from the character of* "*the paper*, to decide whether it should be "carried in the mail or not."

The same view was supported by Senators Davis of Massachusetts, Calhoun of South Carolina, Clay of Kentucky, and others. There was no pretence made by any one participating in the debate, that the measure was in any way *conducive* to the end of establishing a mail service.

Congressional Globe, 1st Sess., 24th Cong., Vol. 3, pp. 437-441, 282, 284.
Calhoun's Report. Calhoun's Works (N. Y., 1883), Vol. 5, p. 190.

e. We are not, at this moment, objecting that the statute is invalid because aimed to accomplish an *object* beyond the power of Congress, or because forbidden by some *express* prohibition of the Constitution. Our argument

now is that being an attempted exercise of *incidental* powers it is condemned by an *implied* prohibition of the Constitution, because the *means* employed by it plainly appear to be in no manner *conducive* to the only legitimate end for which we now *assume* they could be employed, namely, the maintenance of the mail service.

f. This precise ground is well illustrated by the case of U. S. *vs.* Fox (95 U. S., 670). In this case the validity of that provision of the bankrupt law (Sec. 5132 of the R. S.), which made it a penal offence for any person to obtain goods or chattels on credit three months before proceedings in bankruptcy by or against him, on the false pretence of dealing in the ordinary course of trade, was challenged. It was held invalid, because there was in such an act *no relation* to the execution of the power committed to Congress to establish a system of bankruptcy. Says Mr. Justice Field, in giving the opinion of the Court: "Any act committed with a view of "evading the legislation of Congress passed "in the execution of any of its powers, "* * * may properly be made an offence "against the United States. But an act "committed within a State, whether for a "good or a bad purpose, or whether with an "honest or a criminal intent, cannot be made "an offence against the United States, unless "it have *some relation* to the execution of a "power of Congress, or to some matter

"within the jurisdiction of the United "States" (p. 672). An exact syllabus of this decision would be *that Congress cannot make any act a crime, unless it is in some manner "necessary or proper," in the execution of its own powers to do so.*

The case of the United States *vs.* Reese (92 U. S. 214) is also illustrative. The fifteenth amendment provided that the right of the citizens of the United States to vote should not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; and power was conferred upon Congress to enforce this article by "appropriate legislation." Congress enacted a law, which provided, in substance, that offers by a voter to perform any prerequisites to the right to vote should be deemed, in case of wrongful refusal by election officers to accept the offer, a performance; and the subsequent refusal to accept a vote was made a penal offence. This was held not to be "appropriate legislation;" because it went further than was necessary or proper to carry out the power committed to Congress, and made acts offences which might not have denied the suffrage on the ground of race, color, or previous condition of servitude.

The same method of judicial inquiry was approved and followed in Dent *vs.* West Virginia (129 U. S., 114). The question arose whether the Legislature of that State had the authority to prescribe certain qualifications for physicians. The right of the State to protect society by requiring some qualifica-

tion was regarded by the Court as unquestionable; but it did not doubt that this right was subject to limitations, and viewed the question of the constitutionality of any particular legislation as turning upon the inquiry whether it was *appropriate* to the end. Said Mr. Justice Field, in giving the opinion of the Court: "The nature and extent of the qualifications "required must depend primarily upon the "judgment of the State as to their necessity. "If they are appropriate to the calling or "profession, and attainable by reasonable "study or application, no objection to their "validity can be raised because of their "stringency or difficulty. *It is only when "they have no relation to such calling "or profession*, or are unattainable by such "reasonable study and application, that they "can operate to deprive one of his right to "pursue a lawful vocation."

And the case of Cummings *vs.* The State of Missouri (4 Wall., 277), is also in point. In that case the validity of provisions of the Constitution of Missouri, exacting a rigid oath of loyalty as a *qualification* for voting, holding office, &c., was challenged. The Court did not question the right of the State to exact *qualifications* for the discharge of public functions, but, looking into the oath in question, it found it to be not really of the nature of a qualification, and therefore condemned it. Said Mr. Justice Field, in giving the opinion of the Court: "Qualifications "relate to the fitness or capacity of the party "for a particular pursuit or profession." And,

after discussing some of the acts which the party was required to swear he had not been guilty of, he added: "It is manifest upon "the simple statement of many of the acts, "and of the professions and pursuits, *that* "*there is no such relation between them* as to "render a denial of a commission of the "acts at all *appropriate* as a condition of "allowing the exercise of the professions and "pursuits" (pp. 319, 320).

And in *ex parte* Garland (4 Wall., 333), an Act of Congress of a similar character was declared unconstitutional on the same grounds.

4. Courts of Justice always avoid, so far as possible, any inquiry into the *motives* of legislators. They never indulge in it so far as to seek, through the instrumentality of evidence, what such motives are, with the view of invalidating the exercise of admitted powers. A grant which a legislature has authority to make cannot be avoided by proof of fraud in the individual legislators (Fletcher *vs.* Peck, 6 Cranch, 87). But it is often the case that an act of a legislative body may be conducive to either of two objects, one of which may be within the scope of the legislative power, and the other beyond it. In such cases the Courts must and do exercise a greater degree of caution, and where it appears *upon the face of the act*, when it is applied to the affairs upon which it is intended to operate, that the design was to accomplish an object not committed to

the legislature, the act is, with less hesitation, pronounced invalid. Unless this were done, it would be wholly impossible to confine the legislative power within its proper sphere of action. If the *manifest purpose*, or the *necessary effect*, of any legislation be to reach an end beyond the legislative power, it is condemned as unconstitutional. The illustrations of this rule of action are multitudinous. They are most frequently found in cases arising upon the legislation of the States; but, of course, the same rule applies whether the question be whether the States have encroached upon the powers of the general government, or Congress has encroached upon the powers reserved to the States.

a. The course of decision in this Court, in what are commonly called the Passenger Cases, is illustrative of the foregoing rule. Nothing would seem clearer than the right of a State to prevent the introduction within its limits of persons likely to become a public charge; and laws requiring the masters of vessels to report to State officials the names, &c., of passengers whom they propose to land, and to give bonds to indemnify the State against the burden of supporting any of them, would seem very appropriate means of enforcing this right. At the same time, the exercise of such a power certainly approaches very nearly to a regulating of foreign commerce, a subject entirely within the Federal jurisdiction.

In the City of New York *vs.* Miln (11 Pet., 103), a law of this character, passed by the

Legislature of New York, was held, though against weighty dissent, to be constitutional. It did not seem to be anything but a provision designed in good faith to protect the State.

In the Passenger Cases (7 How., 283), the validity of another act of the State of New York, as well as one of Massachusetts, which required the payment of a fixed sum for every passenger landed, was challenged, and held to be invalid on the ground, mainly, that such an exaction from every passenger, whether likely to become a charge or not, went beyond the mere exercise of the police power of the State, and imposed a burden upon foreign commerce.

The State of New York thereupon passed another law designed to obviate this objection, which required the giving of bonds of indemnity only, a thing not found objectionable in the case of the City of New York *vs.* Miln (*supra*); but it allowed the masters of vessels, if they chose, to escape this burden by paying a fixed charge for each passenger. The money thus paid was to be devoted to the indemnification of the State against the expense of supporting pauper immigrants.

This act was held to be unconstitutional by a unanimous Court; and the ground was that it was plain that the statute was so framed as to make it preferable for the master to pay the money instead of giving the bond, and was thus but a *roundabout* way of exacting the money. Said Mr. Justice Miller, in giving the opinion of the Court: "In "whatever language a statute may be framed

"its *purpose* must be determined by its *nat-*
"*ural and reasonable effect*, and it is appar-
"ent that the *object* of this statute, as
"judged by that criterion, is to compel the
"owners of vessels to pay a sum of money
"for every passenger brought by them from
"a foreign port."

b. The cases where the validity of State laws designed to prevent the sale of intoxicating drinks has been drawn in question, present other instances.

c. And so also do the cases arising upon the municipal ordinances of San Francisco in relation to the carrying on of laundries. In the cases of Barber *vs.* Connolly (113 U. S., 27), and Loon Hing *vs.* Crowley (*Ib.*, 703), ordinances forbidding work to be done in laundries in certain places, from ten at night to six in the morning, were held unobjectionable, for the reason that they appeared, *on the face*, to be not unreasonable police regulations for the protection of the good order and peace of the community. It may have been that the real object was to disfavor the Chinese, but the Court would not indulge this supposition when nothing upon the face of the ordinance warranted it. But when a different ordinance was framed, forbidding the carrying on of laundries in San Francisco without the consent of the supervisors, and its validity was

challenged, it was promptly condemned, on the ground that it did not provide for anything in the nature of *regulation*, but gave an *arbitrary* authority to the supervisors to grant or deny what should be a common privilege (Yick Ho *vs.* Hopkins, 118 U. S., 356).

d. So also in those cases where, under State laws, wharfage is exacted, this Court has made the question of their validity turn upon whether they were *really intended* to fix a reasonable compensation for that facility, or to impose an exaction upon commerce. Said Mr. Justice Miller, in giving the opinion of the Court: "In all cases of this kind it has "been repeatedly held that, when the ques- "tion is raised whether the State statute is a "just exercise of State power, *or is intended* "*as a roundabout means to invade the do-* "*main of Federal authority*, this Court will "look into the operation and effect of the act "to discern its purpose." (Morgan *vs.* Louisiana, 118 U. S., 455, 462. See also Ouachita Co. *vs.* Aiken, 121 U. S., 488.)

e. The numerous cases upon the validity of state laws imposing license fees upon traders, drummers, agents, etc., furnish other illustrations of the same doctrine.

f. We close these citations with a reference to a recent decision of this court which presents a striking instance of the necessity which this Court has recognized of scrutinizing the *purpose* of a law with the view of determining whether it was designed to carry out an acknowledged power of the legislature, or to accomplish an end which was beyond its powers. In 1889, the State of Minnesota had passed a law providing for the inspection of meats before the animals were slaughtered, and its validity was attacked on the ground that it tended and was designed to impose a burden upon inter-state commerce. It has always been conceded that the passage of laws providing for the inspection of food, &c., was clearly within the powers of state legislatures, and although there was nothing upon the face of this statute which, in terms operated upon inter-state commerce, this Court did not hesitate to say that it was designed to operate upon that commerce and was consequently invalid. (Minnesota *vs.* Barber, 136 U. S., 313).

Mr. Justice Harlan in giving the opinion of the Court, after referring to prior cases which have been hereinbefore cited, employed very happily conceived language.

"Upon the authority of those cases, and "others that could be cited, it is our duty to "inquire, in respect to the statute before us, "*not only whether there is a real and sub-*"*stantial relation between its avowed objects* "*and* the means devised for attaining those "objects, but whether by its necessary or nat-"ural operation it impairs or destroys rights

"secured by the Constitution of the United "State." (p. 320.)

g. It would, of course, as already intimated, be entirely repugnant to the spirit of the Constitution, and to the equality of the States and the general government in their respective spheres of sovereign action, if the same rule were not applied in determining the validity of a congressional enactment. The same rule has always been applied to each case.

5. Applying this doctrine to the statute before the Court, and inquiring what its natural and necessary effect, and its manifest purpose are, no one will pretend that there is room for doubt. It was passed simply and solely for the purpose of disfavoring, and, if possible, of suppressing lotteries. It is not necessary to resort to the report of the committees introducing the original bill, and which openly avow this as the sole purpose, for it is obvious and undisputable on the face of the act itself. And so it has been declared by this Court.

Ex parte Jackson, 96 U. S. Reports;
House Rep., No. 2844, 1st Sess., 51st Cong.
Sen. " No. 1579, *Ibid.*

6. And here the argument upon the particular question under discussion properly closes; for no one will assert that Congress has power to suppress lotteries any more than it has to suppress any other employment or pursuit. If Congress had enacted a law directly forbidding under penalties, the carrying on of the lottery business in any State, there would be no hesitation in any Court in declaring it to be unconstitutional.

II.—But it would be an oversight to omit to notice a different view upon which an attempt may be made to defend the validity of this legislation, a view indeed upon which the bill already referred to forbidding the delivery of alleged incendiary abolition documents was defended by Senator Buchanan in 1836, in the U. S. Senate. That distinguished statesman insisted that the proposed measure should not be viewed as an *affirmative exclusion* of such documents from the mails, but as a *refusal* by the Government to become an *agency* to furnish means and facilities for the circulation of such publications. And it may be asked here, as he asked in respect to abolition publications, "must the United States "make itself the *agent* of dealers in lotteries and "facilitate that business?" It must be that there is some plausibility in this argument since it has commanded the assent of such able minds; but it has nothing more than plausibility.

1. Inasmuch as a denial of mail facilities to persons wishing to carry on any particular pursuit must, of necessity, so far impede it as to greatly abridge the extent to which it may be carried on, and in many instances render it impossible; and as the argument under notice asserts the absolute right of Congress, in its uncontrollable discretion, to refuse the facilities in any case (and such was Mr. Buchanan's view) (Cong. Globe App., 1st Sess., 24th Con., 1836, p. 437), it involves the assertion that Congress has the right, by such action, to break up, or impede, any business or employment.

2. This argument also involves the assertion *generally*, that Congress, in making provision for the actual and beneficial enjoyment by the people of the powers, privileges and franchises bestowed by the constitution, is clothed with a *discretion*, wholly *arbitrary*, to give them here, and withhold them there, as it may please!

3. Should this position be taken in this cause, it will be the first time it has been directly asserted in this Court. Views somewhat tinctured with the doctrine have sometimes been advanced before it, only, however, to be indignantly rejected. The doctrine of this Court is that the fundamental rights of citizens—and these, certainly, must include all the rights and privileges which are bestowed by the Constitution—can be taken

away only by *due process of law;* and this does not include the arbitrary mandate of the Legislature.

a. We borrow here the language of Mr Justice Field, in Dent *vs.* West Virginia (129 U. S., 114, 123). The question in that case was concerning the validity of a State Statute prescribing qualifications for physicians. The doctrine declared was that if the statute imposed no arbitry restrictions, but such only as were adapted to secure professional competency and skill, it was not open to objection. "As we "have said on more than one occasion, it may "be difficult, if not impossible, to give to the "terms 'due process of law,' a definition which "will embrace every permissible exertion of "power affecting private rights and exclude "such as are forbidden. They come to us from "the laws of England, from which country our "jurisprudence is, to a great extent, derived, "and their requirement was there designed to "secure the subject against the arbitrary action "of the Crown and place him under the pro-"tection of the law. They were deemed to be "equivalent to the law of the land. *In this "country the requirement is intended to have "a similar effect against legislative powers,* "that is, to secure the citizen against any "arbitrary deprivation of his rights, whether "relating to his life, his liberty or his prop-"erty"

And in a prior part of his opinion the same learned Judge says: "It is, undoubtedly, the

"right of every citizen of the United States to "follow any lawful calling, business, or profes- "sion he may choose, *subject only to such re- "strictions as are imposed upon all persons of "like age, sex and condition.* This right may "in many respects be considered as a distin- "guishing feature of our republican institu- "tions. Here all vocations are open to every "one on like conditions. * * * * * * * "The interest, or, as it is sometimes termed, "the estate, acquired in them, that is the right "to continue their prosecution, is often of great "value to the possessors, *and cannot be arbi- "trarily taken from them, any more than "their real or personal property can be thus "taken*" (p. 121).

b. And Mr. Justice Mathews speaking for the Court in Yick Ho. *vs.* Hopkins 118 U. S., 356, 369), reaches and expresses the just view to its full extent, but not beyond it, saying:

"When we consider the nature and the "theory of our institutions of government, "the principles upon which they are supposed "to rest, and review the history of their de- "velopment, we are constrained to conclude "*that they do not mean to leave room for the "play and action of purely personal and "arbitrary power.*" And the decision in this case condemned a municipal ordinance of San Francisco, because it permitted the taking away of the right to pursue an occupation upon the arbitrary discretion of a muni-

cipal board, and upon *no rule equal in its action to all.*

It will be observed that this decision was not based upon the fact that the regulation was in a *municipal ordinance*, and not in any *legislative act;* but upon the ground that the *arbitrary discretion* which it indulged was not bestowed in this country upon any official body, however exalted. And a similar doctrine is declared in Loan Association *vs.* Topeka (20 Wall., 655, 662, 663).

3. The question may be put, whether Congress might not, when it first established the mail service, have so limited it as not to extend its benefits to lotteries, and then have passed a law making it a penal offence to attempt to send by mail any matter to which the privilege had not been extended without constitutional objection. There would indeed, in such case, be no statute specially aimed at lotteries, and yet they would be equally excluded from the benefits of the mail service. They would be excluded, not by taking away a privilege which they once had, but by never conferring it upon them.

This argument supposes that a distinction may be drawn between those rights and privileges which the Constitution found the people already in possession of, and those which should be subsequently conferred upon them under its own provisions.

We must be excused for having little patience with such a distinction. The rights and privileges of the people of the United States,

whether possessed and enjoyed at the time of the adoption of the Constitution, or since acquired under its provisions, are *one common and undistinguishable possession.* The powers conferred upon Congress were mandatory, and the actual exercise of them was contemplated and required. And such exercise was to be for the equal and impartial benefit of all. They were *grants*, not to Congress to be dealt with as it might choose, but to the people, subject only to the regulation of Congress. We may borrow the maxim of equity, and deem what was directed to be done as in fact done; and justly regard the powers thus bestowed upon Congress as a *completed* gift and grant to the whole people equally, of the benefits and blessings intended to be secured by the execution of the powers.

And for this, if authority were needed for a proposition so self evident, we have the highest. Says Mr. Chief Justice Shaw in Capen *vs.* Foster (12 Pick., 485, 489), and the language was quoted with approval in the opinion of this Court in Yick & Co. *vs.* Hopkins (*supra*), "In all cases where a constitution has conferred a political right or privilege, and where "the constitution has not particularly designated the manner in which that right is to "be exercised, it is clearly within the just and "constitutional limits of the legislative power "to adopt any reasonable and uniform regulations in regard to the time and mode of "exercising that right, which are designed to "secure and facilitate the exercise of such "right in a prompt, orderly and convenient "manner;" nevertheless, "such construction

"would afford no warrant for such an exercise "of legislative power, as, under the pretense and "color of regulating, to subvert or injuriously "restrain the exercise of the right itself."

And we may cite from the dissenting opinion of Mr. Justice Bradley, in *Ex parte* Curtis (106 U. S. 371, 376), a very explicit statement of the same doctrine. The opinion of the Court did not proceed upon any denial or question of the views thus expressed by that learned Judge. He was not prepared, even in order to gain the admitted benefit of the Civil Service Laws, to admit the power of Congress to *indirectly obstruct* the equal right of all to strive to gain those offices which it might create. "*The* "*offices of the government do not belong to the* "*Legislative Department to dispose of on any* "*conditions it may choose to impose.* The "legislature creates most of the offices, it is true, "and provides compensation for the discharge "of their duties; but that is its duty to do in "order to establish a complete organization of "the functions of government. When estab- "lished, the offices are, or ought to be, open "to all." If the *offices* which Congress creates cannot be disposed of on such conditions as it may choose to impose, can the great and indispensable service of the mails be thus dealt with?

III.—Driven from the position that the facilities which Congress creates by its laws enacted in execution of the powers bestowed by the constitu-

tion may be given or withheld in the arbitrary discretion of Congress, the supporters of the legislation in question, accepting the true view, and confessing that the exclusion proceeds upon the ground that the lottery business is of an *immoral* and *injurious tendency*, may assert that it is defensible upon that ground. We have, indeed, thus far industriously omitted to deal with this view; but only in order that we might first strip it of all considerations not relevant to it, and thus be enabled the better to determine whether it is well founded. We now insist that Congress has no power to exclude matter concerning lotteries from the mails on the ground that the circulation of such matter would have an immoral or injurious tendency.

1. That this was the real purpose of Congress is, of course, not open to doubt. It is not only apparent and undisputable on the face of the statute, but was, as already observed, avowed by the Committees of both Houses; and was so regarded by this Court in *Ex parte* Jackson (96 U. S.). Viewing the statute in this light we have the real question before us.

2. What *power* then did Congress *really* exercise when enacting this exclusion. Not, certainly, a power of *regulating the mail service*, in order to make that service practicable, convenient and efficient. If the prior argument has been in any degree successful, it is clear that there was

no relation between the *means* employed and *that* end. And we have also shown, and the view under consideration concedes, that the *object* was an entirely different one.

The *real* power, therefore, which Congress attempted to exercise was to hamper and impede, and, if possible, to destroy, the lottery business, in order to protect the people of the United States from the assumed demoralizing and dangerous tendency of lotteries. Inasmuch as no one pretends that Congress may pass a law directly suppressing lotteries on the ground that they have an immoral tendency or, indeed, on any ground whatever, the question is whether it can pass a law, not directly suppressing them by declaring them to be crimes, but harassing and obstructing them by withdrawing from them facilities which are under its control for no other reason than that it *deems* them crimes which it *would* suppress if it had the power.

3. This question must be promptly answered in the negative, for the power *thus attempted to be exercised is a power to suppress lotteries and that alone.* No such power can be derived from any express language in the constitution, nor by any just implication from any language in it. More than this, the possession of any such power by Congress is utterly inconsistent with the whole theory of the constitutional relations between the general Government and the States.

a. Leaving out of view as immaterial the territories, and the power of Congress to legislate in this way for them, nothing is clearer than that the carrying on of a lottery, or the dealing in the lottery business, or with a lottery is, in every instance, an act done *within* a State, and the power to declare such acts crimes, or to punish them as such, or to obstruct and impede them *because* they are crimes, is lodged exclusively with the State governments. They possessed this power before the adoption of the Constitution. They did not part with it by that adoption. Indeed, nothing was more sedulously guarded against by that instrument than the notion that the States had parted with any of their governmental rights over the conduct of their own citizens upon their own soil, except in respect to such concerns as were expressly intrusted to the Federal Government. In respect to all rights other than those thus excepted, that government was to be as absolutely powerless as if it were a foreign State. To borrow the language of Mr. Chief Justice Waite in U. S. *vs.* Cruikshank (92 U. S., 542, 550). "Within the "scope of its powers, as enumerated and "defined, it is supreme and above the States; "but beyond, *it has no existence.*"

b. Whether a citizen of Louisana, or of Maine, may carry on the lottery business, or do any act in the transaction of any business with a lottery, must therefore depend on the laws of

those States respectively. They may forbid and suppress that business within their limits, or they may permit and encourage it. Can it be true that the theory of the distribution of powers and functions between the States and the general Government contemplates that a State may permit a lottery, even encourage it and shape its laws to that end, and that, at the same time, the general Government may discourage and impede them and shape its laws to that end, and that both Governments would at the same time be acting within the scope of their authority and the action of either, if challenged in this Court, be upheld? There is, indeed, a possibility contemplated of a conflict between a law of the United States and a State law, in which case the latter must give way. But this is a case of *direct* conflict, where each Government has a power to legislate on the subject. Surely it is not contemplated that there shall be such a conflict between the direct legislation of a State within its conceded powers and an *indirect* attempt on the part of Congress to accomplish an object which it has no power to accomplish by *direct* legislation.

c. The most hasty glance at the consequences of such an assumption of power by Congress to operate *indirectly* upon matters which are lodged exclusively with the State Governments would be enough to show that such a doctrine is wholly inadmissible.

If Congress may disfavor one occupation, or

business, by withdrawing from it the benefit of the mails, it may another. Should those who favor the prohibition of the sale of intoxicating drinks obtain a majority in the national councils—and perhaps that is now within their power—they may forbid the carriage of any mail matter relating to that business. And what limit could be set by this Court to such an assumption of authority?

And if Congress may exclude matter from the mails on the ground of the subject to which it relates, why may it not exclude on the ground of the character of the *persons* sending or receiving it? If the power of exclusion is to be exercised according as it may promote such views as Congress may entertain in relation to public morality, the criterion of *persons* might be thought quite as effective as that of *subject matter*.

Indeed it is clear that the doctrine under notice places it within the power, and consequently within the moral duty, of Congress to adopt a system and policy of public and private morality and ethics, not only upon subjects confided to its authority, but upon all others which may be affected by its legislation; and to grant and withhold the great benefits and facilities which it is its duty to supply as it may think agreeable to the dictates of such policy.

It was generally conceded in the debate in the Senate, in 1836, upon the proposal to forbid the circulation of incendiary abolition documents, that the Southern States would be entitled to the protection of such a law were it

within the constitutional power of Congress; but had the sentiment on the subject of slavery been at that time what it is now, the effort would rather have been to forbid the carriage in the mail of everything in *favor* of slavery, and if the doctrine under discussion be correct, a law to that effect could properly have been enacted.

d. Against all such views we respectfully insist that where Congress cannot by *direct* legislation pronounce a business to be a crime and punish it as such, but that power has been reserved to the States, it is not competent to Congress to determine it to be a crime, and to deprive it of the benefit of the mails for the sole purpose of endeavoring to suppress it. What cannot be done directly cannot be done indirectly.

Cooley, Cons. Limitations, 208.

Taylor *vs.* Commissioners of Ross County, 23 Ohio St., 22.

4. A plausible attempt may be made to retort upon us the argument drawn from possible consequences. "Is it true, then," it may be asked, "that the Government of the United States is placed in the singular attitude that it cannot discharge its duty of maintaining a mail service without extending the facilities which that service affords to criminals of every description to aid them in the commission of

crime? Cannot that government decline to become the principal instrumentality in the circulation, for instance, of obscene books and pictures, without an entire abrogation of its postal service? Are the statutes passed for that purpose also invalid?" Whatever force the argument thus suggested may seem to have is more apparent than real. It is founded upon a failure to notice fundamental distinctions in the nature of criminal offences.

a. The embarrassment arising from the circumstances that measures designed to repress and punish crime may have the effect of invading individual rights, or of injuriously affecting other great public interests, is the common incident of governmental administration. Unavoidable alternatives are sometimes presented, in which, if either is adopted, certain mischiefs will inevitably follow. Such difficulties are sometimes met by a comparison of the respective disadvantages, and by an acceptance of those which, on the whole, seem less weighty. The carrying on of the mail service exhibits some of these difficulties. Undoubtedly, by means of the facilities of that service the most dangerous and detestable crimes can be plotted and facilitated, and the detection and punishment of them baffled. Murders, arsons, burglaries and treasons may be thus made easier to commit and more difficult of detection. Public enemies are thus afforded a facility for prosecuting hostile enterprises against the

Government. It may be asked—"Must the "Government carry a letter and deliver it "even when there is good evidence to believe "that it contains matter designed to facili- "tate a hostile conspiracy against itself? "Can it not open a letter if there is a well "founded probability that it contains evi- "dence upon which the basest of crimes may "be detected?" One answer involves the breach of the highest confidence. The other makes the Government itself an accomplice, as it were, in the commission of crime. Great Britain meets the difficulty by taking one of the alternatives. We have preferred to accept the other. There, by immemorial law, a letter may be taken from the mails and opened upon the order of a Secretary of State (Paterson, Liberty of the Press, Lond., 1880, p. 60). With us no such liberty of dealing with correspondence is permitted in any case.

b. Additional difficulties are, in a divided Government like ours, undoubtedly presented. The advantages of such a system cannot be purchased without sacrificing something by way of price. A Government possessing entire and undivided sovereignty may select between alternatives according to its pleasure. But where there is a separation and distribution of powers between two Governments, neither can enter a field which has not been assigned to it.

c. The preservation of the powers and functions reserved to the States is, in the view of constitutional jurisprudence, of equal importance with the preservation of those bestowed upon the general Government. The two systems stand upon an exact equality (The Collector *vs.* Day, 11 Wall., 13). And if, as has been declared, it is the duty of this Court, when the range of the powers of the States comes near to the field entrusted to Congress to sedulously guard against any intrusion (Railroad Company *vs.* Heisen, 95 U. S., 465, 474), it is also its duty, in the corresponding case, when the means employed by Congress come near to a power reserved to the States, to observe a corresponding vigilance against intrusion by Congress. It is only where there are *concurrent powers*, that the legislation of Congress is supreme.

d. But the first thing to be done, in the attempt to dispose of the difficulty suggested, is to ascertain its real nature and measure its extent. It will be found to be of much less magnitude than, at first blush, it seems. The suggested consequence of the position taken by us, that the general Government, having no power to *directly* repress lotteries in a State, cannot, for the sole purpose of doing something towards the suppression of them, exclude them by penal laws from the benefits of the mail service, is that the general Government is under the like disability in relation

to all other crimes, and cannot exclude matter promoting murder, arson or treason, and must admit its laws forbidding the carriage of obscene books and pictures to be invalid. But this reasoning is wholly erroneous.

e. The grand and principal distinctions between right and wrong, between what is criminal and what is innocent (and we mean the practical and existing distinctions, and not absolute or theoretical ones) are not created by *laws*. They exist in the minds of men antecedently to formal government, and are indeed a preliminary condition to the organization of any political society. It is not possible that such a society should subsist, except where one part is under subjugation to the other, unless there is a *general concurrence* among its members in relation to these distinctions. Propinquity, common origin and mutual intercourse produce this concurrence, and at the same time generally determine the territorial limits of the political organization. The *laws* are, for the most part, merely a recognition of the moral opinions of the members of the State, and are designed to enforce conformity in *conduct*. The truth of these observations will be acknowledged when we reflect that the great bulk of the business of all judicial tribunals consists in administering and enforcing *opinions* as to what is right and what is wrong—a whole code of moral and political ethics—

which is nowhere expressed in laws, but silently assumed to exist.

e. It is extremely plain that a government, being a corporation composed of members who are moral agents, and itself designed for moral purposes, is itself a moral agent, and its corporate action is supposed to be regulated by moral rules. When, therefore, the government of the United States was formed, with legislative and judicial powers, it must have been assumed that those powers would be exercised in accordance with the rules of morality—those distinctions between right and wrong—which obtained universally in the societies over which it was to extend.

f. But, on the other hand, political societies have the power to create *new* distinctions between right and wrong, and thus to declare practices before regarded as innocent, or indifferent, to be criminal offences and to punish them as such. Every completely sovereign power is clothed with this function; but a government not completely sovereign, may or may not have it. The charter of its powers must be scrutinized in order to ascertain how far its authority in this direction extend.

Turning to the division of powers made by our Constitution between the States and the general government we find, as its most dis

tinctive feature, that certain enumerated powers were awarded to the latter, and all others reserved to the former. And among the powers so reserved most certainly that of determining what *new* things should be declared and treated as criminal offenses against the good order of society was embraced, except so far as distinct powers of legislation upon particular subjects were conferred upon the general government.

g. There is, therefore, a well defined line which limits the extent to which the general government can act as a *moral person*, and regulate its powers so as to favor or disfavor particular acts of individuals in the States. That line is, in general, co-incident with the boundary everywhere recognized as separating *mala prohibita* from *mala in se.* A *malum in se* is a thing absolutely evil in itself; not indeed *absolutely* in a philosophical sense, but absolutely according to the universal conviction in the political society which so views it; and *mala prohibita* are those things, otherwise indifferent or inocent, which the *legislative power having control over the subject* may declare to be offences.

h. This reasoning dispels the difficulty arising from the apprehension that if we deny to the general government the power of excluding lottery matter from the mails, we must also

deny it the power of excluding matter tending to promote any other crime over which jurisdiction is not given to the government. As to all crimes which are *mala in se*, and as to all other matters which by the Constitution Congress has express power to declare to be criminal offences and to punish them as such, it is the right and duty of the government to act as a *moral agent*, and to grant or withhold its mail, or other facilities, in a way calculated to promote such a moral policy as it may approve. But upon all other subjects the right to exercise moral control is lodged exclusively with the States.

i. This distinction enables the government to exclude from the mails all matter promoting such acts as *it* has the authority *to declare to be criminal offences and to punish as such;* and also all matter promoting what were, at the time of the adoption of the Constitution (and possibly what in the progress and developement of our society may come to be) universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, larceny, &c. And in this latter class the offense of circulating obscene books and pictures undoubtedly falls. This was a well known offense at common law.

Lord Campbell in Dugdale's Case, 2 Deasly C. C., 64, 75.
Holt's Laws of Libel, 73.

j. The power committed to Congress over post-offices and post roads is an *exclusive* power. The carriage of the mails is, in the most accurate sense, a *public franchise*, as much as that of establishing and maintaining public highways. It is the *duty of government* to furnish this benefit; and, this being its duty, it has the right to exclude all attempts other than its own to supply the facility. The states owned this franchise within their respective limits before the Constitution. They surrendered it to the general government to the end that it might be the more efficaciously, conveniently and usefully exercised *to secure its own objects*. And it was with the same purpose that the states surrendered all the other vast powers which are lodged exclusively in Congres. At the same time they as sedulously reserved to themselves the control over their internal policy, and especially over such questions as what occupations and employments should be permitted within their limits.

Will any candid mind believe that it ever entered the thoughts of any delegate to the Convention which framed the Constitution, that Congress would be at liberty to employ the great public franchises and other vast powers which had thus confidingly been surrendered to it, not simply for the purpose of making them more useful to the ends to which they are properly subsidiary, but also to attack by indirection the domestic interests which had been so carefully reserved?

k. If such a supposition could be indulged, it would follow that the slave-holding colonies had consented, not indeed that Congress might directly abolish slavery, but that they might attack it *indirectly*, by withholding from it the benefit of the great agencies, such as the mails and the courts, absolutely necessary to the existence of any society. There never has been a time in which such a pretence would not have been disallowed by any candid statesmen or constitutional lawyer.

5. The question then, is, "are lotteries and dealing with lotteries *mala in se?*" Upon this no argument need be employed. The common conviction of men has never so regarded them. Universally allowed at the time of the adoption of the Constitution, and still allowed in some of the States, that can only be regarded as among that class of things which may be made *mala prohibita*. And so it has been declared in an authoritative decision of this Court.

Stone *vs.* Mississippi, 101 U. S., 814, 821.

6. It may be true that the criterion of *mala in se* changes with the lapse of time and the progress of society, and may eventually stamp lotteries as included in that class; but that time has not arrived so long as any State chooses to deem them innocent or indifferent; indeed, not until the conviction of their evil tendency has become so universal and established as to make it in a

high degree improbable that they ever will be allowed.

7. The reasoning and the conclusion of Mr. Chief Justice Marshall in the case of the Antelope (10 Wheat., 66), are precisely analagous and in point. A revenue cutter of the United States had captured and brought into port a vessel having slaves on board (belonging to foreigners), for the purpose, as was alleged, of carrying them to a market for sale, and she was libelled on the ground of being engaged in unlawful commerce.

The slave trade had been declared to be piracy by the laws of the United States as well as by those of many other, but not all, nations; and the principal question was whether the United States could enforce, under the law of nations, its own moral policy. It was admitted that the traffic was against what is called the law of nature, but it was not against the law of nations.

The Court took the ground that the United States, as one of the members of the great society of nations, could enforce no law against any other member which had not assented to that law. The Chief Justice fitly prefaced his discussion with the caution that in examining claims in which the sacred right of liberty was involved, "this Court must not yield to feelings "which might seduce it from the path of duty, "and must obey the mandate of the law" (p. 114), and after stating the question proceeded: "Whatever might be the answer of a moralist to

"this question, a jurist must search for its legal "solution on those principles of action which "are sanctioned by the usages, the national "acts, and the general assent of that nation of "which he considers himself as a part, and to "whose law the appeal is made. If we resort "to this standard as the test of international "law questions, as has already been observed, ""is decided in favor of the legality of the "trade. Both Europe and America embarked "in it; and, for nearly two centuries, it was "carried on without opposition and without "censure. A jurist could not say that a prac-"tice thus supported was illegal, and that those "engaged in it might be punished, either per-"sonally or by deprivation of property.

"In this commerce, thus sanctioned by uni-"versal assent, every nation had an equal right "to engage. How is this right to be lost? "Each may renounce it for its own people; but "can this renunciation affect others?

"No principle of general law is more uni-"versally acknowledged than the perfect "equality of nations. Russia and Geneva have "equal rights. It results from this equality "that no one can rightfully impose a rule on "another. Each legislates for itself, but its "legislation can operate on itself alone. A "right then which is vested in all by the con-"sent of all, can be divested only by consent, "and this trade, in which all have participated, "must remain lawful to those who cannot be "induced to relinquish it" (p. 122).

And so it is with the States of the Union in relation to lotteries. Any attempt by the general government to suppress them in the States

is simply an attempt on the part of some of the States, through the agency of the general government, to impose a rule upon the others; and the sole question is whether the States thus aimed at have accepted the policy.

Second Point.—But the statute in question is invalid, not only for the reason that none of the powers conferred upon Congress were sufficient to authorize it, but also because Congress was by an *express restriction upon the exercise of those powers*, prohibited from making such a law. It is a law "abridging the freedom of the press" within the meaning of the First Amendment.

I.—It is important to keep in mind throughout this discussion, that the constitutional safeguard thus invoked is not so much a limitation upon the *express powers* enumerated and granted to Congress, as it is a restriction upon the *legislative means* to be employed in the exercise of those powers Speaking with precision, it is a restriction upon the *incidental* powers which Congress may exercise in carrying out its express powers. When read, as it should be, as a part of the Constitution, it is as if the Seventeenth clause of the Eighth section of Art. I, contained these words. The Congress shall have power "To "make all laws which shall be necessary and

"proper for carrying into execution the foregoing "powers, and all other powers vested by this "Constitution in the Government of the United "States, or in any department or officer thereof; "*provided, however*, that it shall make no law "abridging the freedom of the press."

The argument, therefore, upon which we are now entering is to the effect, that if the power of excluding lottery matter from the mails could be regarded as *incidental* to the power of establishing post offices and post roads, Congress is prohibited by the First Amendment from exercising it.

II.—Any discussion of the question, whether an enactment of Congress abridges the "Liberty of the Press," should properly start with a clear statement of what that phrase imports, or rather what it imported at the time of the adoption of the Federal Constitution, for it was the particular Liberty of the Press which then existed, which was, and is, protected by the constitutional safeguard.

Our proposition is, that this Liberty of the Press *imported the liberty of free discussion in print, without any restraint, save that which was imposed by the law of libel as it then existed in the jurisprudence of England and her American Colonies.*

1. The primary meaning of *liberty* is *exemption from restraint;* and absolute liberty imports

entire freedom in the individual to do whatever he pleases. Such absolute liberty does not exist in any form of society, either civilized or barbarous. The very existence together of more than one individual brings with it some restraint, either of force or fear.

The actual Liberty of the Press, which the constitutional safeguard secured, was the liberty of discussion in print, qualified and limited by those restraints which society had ascertained and declared to be necessary to social peace and order.

2. The inquiry, then, becomes what were the restraints which, at the period in question, were imposed upon the liberty of free discussion in print. These cannot be justly apprehended without some brief examination into the nature, the importance, and the history of free discussion.

It will at once become manifest that we are dealing with a subject which, so far as concerns free government, transcends every other in importance.

a. In most human societies, if not in every one, there are found two opposing tendencies ; one on the part of those in power to preserve the existing state of things, which is to preserve their own supremacy ; the other on the part of those who are governed, to reform and improve, as they think, the existing condition.

It matters not whether the government is absolutely despotic, or in the hands of an aristocracy, or in the hands of a majority, as in a republic. The opposing tendencies, though operating with different degrees of activity, are, in each case, present.

c Government is but the exercise of *power*. And this is true whether the power is arbitrary and despotic, or limited by custom and tradition, or, by constitutional forms, to the enactment and execution of regular laws. Its essential nature is *restraint*.

d. Every despot' identifies government with himself; and views any attack upon himself as an assault upon the State. The *disposition* is the same in the freeest of States. Those in office, and the majority which they represent, are apt to think that the safety of the State depends upon their retention of the Sovereign power. It is less apparent, but really true, that in republics, as well as despotisms, all attempts to undermine the authority of the governors are viewed as offenses, and will be met with as great an exercise of repression, either arbitrarily or by law, as those in authority may think it safe to exercise. The spectacle of a party in a republic seeking by an exercise of the power it has gained to intrench itself in its position is entirely analogous to the arbitrary persecution by a despot of his supposed enemies.

e. All government rests upon *opinion.* This is as true of despotisms as of republics; although the former are less sensitive to opinion; and it is, if not theoretically acknowledged, tacitly felt, by all governments. And hence, all governments, whether temporal or spiritual, have viewed *free discussion*, which creates, concentrates and consolidates opinion, as a menace to their existence, and have conscientiously regarded it as a duty to repress it.

f. The conflicts thus engendered have resulted in the most bitter persecutions and the most devastating wars; all the more bitter and devastating from the fact that the combatants on each side have been equally sincere and equally confident that the salvation of society depended upon their success. The overthrow of one set of rulers has been succeeded by the elevation of another equally intolerant, and equally ready to employ the same arts of repression which had been exerted against themselves.

g. But for some centuries there have not been wanting enlightened minds who have perceived that such an exercise of the powers of society was not consistent with the advancement of truth, either in morals, religion or government; and that some other solution must be found for the question how far the

right of free discussion should be limited and restrained.

That solution was found a century and more ago by Great Britain, in the thorough establishment of the doctrine of the Liberty of the Press, as explained in the first proposition stated in this brief, and it has been accepted by the States and Colonies, of which she has been the parent. It has been acknowledged and accepted to some imperfect extent by other European nations, but can hardly be said to have become incorporated into the fundamental law in any of them. The extent to which this solution is acted upon by any State, marks the degree of its freedom and civilization, and its capacity for progress.

III.—Liberty of the Press, as thus understood was, as all great achievements are, the fruit of a long struggle, in which there may be discerned two successive principal stages, in each of which the principle received a distinct enlargement and more exact definition. It is of much importance, to a just apprehension of the principle, that this gradual development should be studied.

1. The first stage of this development was marked by the abrogation of all *censorship* of the press, which left men free to print and publish their opinions *without previous restraint.*

a. The application of the art of printing furnished a new and prodigious instrumentality for creating, consolidating and disseminating *opinion*; and consequently for attacking government, religion, and all establishments resting upon opinion. The disposition to employ repressive power, always natural to those who are the custodians of it, was everywhere yielded to, and the most effective form of repression—that which acted *beforehand*, and directly *prevented* the obnoxious practice—was resorted to, not only under despotic governments, but even in England.

The authority thus asserted under the form of a censorship, or previous restraint, permitted nothing to be printed except such matter as had been *allowed* by the censor, and made provision for the summary search, seizure and destruction of unlicensed works, and of the presses, materials, etc., employed in printing them.

b. This power seems originally to have been exercised by the Crown itself; and in two forms—*first*, by the prohibition of printing anything not allowed by the licensor; and—*second*, by vesting the exclusive privilege of printing, even under these restrictions, in a few favored grantees, the two Universities, and the Printers' and Stationers' Company of London. At a subsequent period it was lodged in a body every way fitted for such a purpose—the Star Chamber. It was asserted by the Long Parliament during the vacancy

on the Throne, and, after the Restoration, was again vested in the Crown by Acts of Parliament. (For an account of the origin and nature of the censorship the following authorities may be consulted :)

May, Con. Hist. of England (N. Y. 1874), vol. 2, Art. IX., pp. 102–106.

Entick *vs.* Carrington, 19 How. St. Tr. 1029.

13 & 14 Car. II., c. 33.

Scarlett, *arg.* Rex *vs.* Burdett, Lord Abinger's Mem., p. 297.

Erskine's speech in Rex *vs.* Cuthell.

(Erskine's Speeches, Ridgway's Lond. ed. 1812, vol. , pp. 213, 233, 244.)

Erskine's speech for Thomas Carnan, (Speeches, Lond. 1810, vol. 1, p. 38).

Dicey's Law of the Constitution (Lond. 1886) p. 274.

Odgers' Libel and Slander, 2 Lond. Ed. 10.

Paterson, Liberty of Press, Speech & Worship, 38–61.

c. A prerogative of this nature, involving as it did the destruction of property and the deprivation of personal rights without previous accusation, trial and conviction, committing the determination of the most important questions to the arbitrary decision of a man who would necessarily be but the tool of those who appointed him, was wholly inconsistent with the fundamental principles of English liberty then beginning to assert themselves. It was inevitable that sooner or later it would

be deliberately challenged and overthrown. An order of the Long Parliament in 1648 drew from John Milton his Areopagitica, in which he defended the liberty of unlicensed printing with all the power and splendor of his genius.

d. Limited in their operation to the period prescribed in them, it was necessary to the continuance of the restrictive policy that the censorship laws should be from time to time renewed, and the growing antipathy to them naturally expressed itself in opposition to the attempts at renewal.

A select committee of the House of Commons was appointed in 1695, to report what temporary acts than about to expire should be renewed; and it reported in favor, along with others, of the act creating a censorship of the press; but when the vote of the House was taken on this recommendation it was decided in the negative. The Lords sent back the bill, containing other temporary acts, with an amendment embracing the one thus rejected; but the Commons refused to concur, and, upon a conference, the managers on the part of the Commons delivered to the Lords a weighty report condemning the whole system of censorship, and the Lords yielded.

This report dwelt more upon the incidental evils of the system of licensing, such as jobs, exactions, seizures, domiciliary visits, &c., than upon the general advantages of free dis-

cussion, and in this the historian Macaulay finds matter to gratify his love of paradox. "Such" says he "were the arguments which did what Milton's Areopagitica had failed to do." But it would be a mistake to suppose that that immortal plea for the freedom of thought, speech and the press had then passed from the minds of men.

This action of Parliament is declared by the same historian to have "done more for liberty and civilization than the Great Charter, or the Bill of Rights." (Macaulay's Works, New York, 1866, vol. 4, pp. 124–126.) That it was this action which constitutes the *beginning* of the era of the Liberty of the Press in England is everywhere agreed.

2. It was, however, but the beginning. Free discussion may be restrained as well by *subsequent punishment*, as by *previous restraint*. It is, in either case, only *the fear of punishment* which operates to prevent men from publishing what they may have a desire to publish. And this fear may be created as well by annexing penalities to the publication of writings in some manner specified and described, as by forbidding the publication of *unlicensed* writings under similar penalties.

The *censorship* had fallen almost upon the first deliberate attack. It was far otherwise in respect to the question of *subsequent punishment*.

It was agreed upon all hands that no man could be punished for publishing any writing

unless it was what the common law as it then stood denounced as *libellous*. But the momentous question arose in whom was the power lodged of ultimately determining whether a publication be libellous. If it were reposed in a select magistracy created by and dependent upon the arm of power, a restraint might be re-established quite as tyrannical and effective as the censorship. If it were committed to ordinary juries taken from the body of the people and exercised under all the safeguards of a regular jury trial, the largest possible measure of freedom would be secured. The advocates of privilege and prerogative—the *possessers* of power—naturally took the first position. The advocates of freedom asserted the second. After a memorable contest which "shook the foundations of Westminster Hall," and was carried into Parliament, the latter obtained a complete and final triumph. *And this marks the second stage in the struggle* for the liberty of the press.

May's Const. Hist. of England ; Vol. 2, pp. 108, 122.

a. There were two ways in which after the fall of the censorship a restraint more or less effective might have been asserted. One was by a legislative change in the common law of libel. Parliament might have enacted that any publication calling in question the powers of magistrates or other public officers, or the authority of the established church, or advocating certain designated views upon morals

or government, should be deemed libels. Such laws would theoretically, at least, and, in most cases, in fact, have required juries to find publications to be libellous which would before have been held innocent. Such attempts seem never to have been made in the British Parliament. Probably, at no period subsequent to the revolution would they have been successful.

The other method was by asserting that the question whether a paper is libellous is a question of *law* to be determined by the Court, whose instruction the jury is bound to accept, confining itself to the question of *publication* alone. This is substantially clothing the Judges with the same power which, as above indicated, the legislature might assert.

b. As already indicated the partisans of power and restraint accepted the latter method. There were divers reasons for this preference. It would not arouse the opposition which might be excited by attempts to *change* the law. The decisions of the Courts are not enactments, but declarations of what the law *is*. Moreover, there were plausible grounds upon which such a view might be defended. The construction and import of writings is, in general, a question of law. And at this period, although the precedents were not uniform, there were some at least, if not a majority in accordance with the view. And finally this doctrine did not, on its face,

appear to assail the liberty of the press. Those who advocated it could still agree with their opponents, that a man might publish with impunity anything which at common law was not a libel.

c. But the whole question of the freedom of the press, was wrapped up in the question whether the ultimate decision be lodged with the Judge or the jury. If with the former, that freedom would be under the control of a fixed magistracy necessarily inclined to support the pretences of power, and the same reasons which guided the action of the censorship, would be made the grounds of judicial determination. This truth became well illustrated in the course of the struggle with which we are dealing. The censorship act (13 and 14, Car. II., c. 33) was from time to time renewed down to 1679, when it was permitted temporarily to expire. The support of the pretences of the Crown was then devolved upon the Judges; and how thoroughly they were prepared to render that service may be seen by the doctrine declared by the twelve Judges, Scroggs, C. J., at their head, in Carr's case, 1680 (7 St. Tr, 929), that it was criminal at common law to write on the subject of government, whether in praise or censure; "for no man has a right to say *anything* of government!" (See also, Entick *vs.* Carrington, 19 How., St. Tr., 1069–1071.) But if the decision were lodged with the jury, it would reflect the sentiment of the pub-

lic, and consequently secure to the press that real freedom so essential in enlightened government.

d. That the real issue was of this nature was not, at first, distinctly perceived. The Judges naturally assumed the office of instructing juries what were libels and what were not, without, however, at first, insisting that it was not competent for the jury to pass upon that question themselves; but, finally, cases arising where it was feared that the juries might acquit contrary to the opinions of the Judges, the latter came to insist that the jury were concerned alone with the fact of publication and the truth of the innuendoes, and must leave the question of the character of the publication, as criminal or innocent, to the Court.

It was at once perceived by the liberal statesmen and lawyers of the time that this position, if established, rendered the liberty of the press an empty sound, and that the old doctrines of the censorship would be renewed under another form. Under the powerful influence of Lord Mansfield the twelve Judges were brought to something like an agreement in favor of this menacing doctrine; but the boldest spirits of the English Bar supported by the most distinquished statesmen of the time, Lords Chatham, Camden (himself an illustrious lawyer), Burke, Fox, Sheridan and others denounced it as an outrageous perversion of the ancient law of the realm.

e. The champion of the doctrine of restraint, Lord Mansfield, pronounced the first deliberate opinion on the question in the case of The King *vs.* Woodfull, in 1770 (20 St. Tr. 895). The trial had been before him, and in his charge to the jury he had delivered to them his opinion of the liberty of the press as follows: "As for the liberty of the press I "will tell you what that is; the liberty of "the press is that a man may print what he "pleases without a license; as long as it re- "mains so, the liberty of the press is not re- "strained"! He then told the jury that the question of libel or not libel was not for them, and this charge was held correct by a subsequent decision of the Court on a motion for a new trial. But, soon after the trial, and before this decision had been delivered, the public mind had taken alarm at these doctrines and had found expression in a motion by Sergeant Glyn in the House of Common for a committee to enquire into the proceedings. Upon this motion, in the course of a long debate, the Chief Justice was severely censured by the mover, as also by Dunning and Burke, and defended by the Attorney-General and by Thurlow, as well as by Charles Fox, who had not then arrayed himself on the popular side (Part First, 1211–1302).

He was also assailed in the House of Lords by Lords Chatham and Camden. After the delivery of his judgment in the King's Bench, he was formally attacked by the latter and challenged to debate the question. He at first seemed to accept the challenge, but finally declined and remained

silent, to his great discredit, as Lord Campbell informs us.

Lives of the Chief Justices (New York), Vol. 4, pp. 387-393, 485.

f. The judgment in The King *vs.* Woodfull had no effect in settling the question. It was again revived and made the subject of a great and memorable debate in 1784, in the case of The King *vs.* The Dean of St. Asaph, in which Erskine made the immortal argument which will forever stand as the finest union of perfect logic and fitting eloquence in the language. Drawing a just distinction between private and public libels, he asserted, concerning the latter:

(1.) That the question of guilty or not guilty on an indictment could not in general be determined without determining the *intent* with which the writing was published; and that this had nothing in it resembling a question of *law*, but was a pure question of *fact*.

(2.) He exposed with pitiless severity the pretence that a verdict of guilty on an indictment for a libel, differing from a like verdict in other criminal cases, proved only the fact of publication, and left the question of guilt or innocence wholly undecided. He put it to the Court to answer these questions. If the jury have nothing to do with the question of libel or no libel, why have the Judges for a

hundred years been so sedulous to expound to them that the publication was a libel? Why is a verdict of *guilty* asked for and given, if the question of guilt is withdrawn? How is it that where the indictment is laid upon a part of a writing or book, the jury is permitted to take into consideration the whole writing or book?

(3). And he put it with unanswerable force that inasmuch as sentence and execution might immediately follow a verdict of guilty, the defendant would be punished without a trial, if, as Lord Mansfield had declared, the verdict of guilty left the question of guilt or innocence open.

(4.) He showed that the authorities, even in the King's Bench, had been far from uniform, and that the doctrine for which he contended had the support of the judges in the great case of the seven Bishops, and of the commanding authority of Holt in Hutchin's case.

(Erskine's Speeches, Ridgeway's Ed., Lond. 1810, Vol. 1.)

The above are but a few among a multitude of arguments and illustrations with which the great advocate overwhelmed his adversaries.

The spectacle exhibited by Lord Mansfield in affirming the ruling the ruling of Butler, J., against the argument of Erskine was most pitiful (3 Term, Rep., 428, n.) He made no

attempt to answer it. He could make none with any show of success. He was obliged to admit that his doctrine that a verdict of guilty on a general plea of not guilty, left the question of guilt undetermined and was equivalent to a special verdict in other cases, was an anomaly in English law, and fell back for his support of this pretended anomaly, not upon any considered decision founded upon deliberate argument, but upon what he alleged to be the *understanding* of the Bench and Bar. He even asserted that this had been the general understanding among the leaders of the popular party, and in proof of his assertion, imputed to Pulteney the following lines as having been written by him in a ballad :

> "For twelve honest men have decided the cause,
> Who are judges of fact though not judges of law."

In truth, the lines in Pulteney's ballad, were precisely the reverse. They ran :

> "For twelve honest men have determined the cause,
> Who are judges alike of the facts and the laws."

(Lord Campbell's Lives of the Chief Justices, New York, Vol. 3, p. 450.)

f. This great argument of Erskine was printed at the time and widely circulated, and sank

deeply into the public mind. It was never answered; and it may safely be said that the general judgment of the profession ever since has been that Lord Mansfield's doctrine was a perversion, and not a declaration, of the English law. Lord Campbell pronounces it to have been "based upon a transparent fallacy" (Lives of the Chief Justices, New York, Vol. 4, p. 450). The conviction of the public mind, well established long before, was finally made thoroughly effectual in 1792 by the passage of the bill introduced by Mr. Fox, who had then become a convert to popular principles, which enacted in effect that in public prosecutions, while the judges might declare their opinions as to whether a paper was a libel, the jury should have the right to pass upon the question in giving their verdict. This act purported to be, what it was in fact, simply declaratory of the pre-existing law. It was passed unanimously in the House of Commons, and by a large majority in the Lords.

g. The doctrine rests upon impregnable foundations in reason. When any charge is made against an *individual*, a fact is asserted, the *truth* of which may be tried, and, unless justified, or shown to be privileged, malice, and consequently guilt, must be imputed to the defendant. But what is called a *public* or *seditious* libel is not a charge against any *person*, but the assertion of something supposed to be detrimental to correct principles of morality

or government. It is, therefore, an attack upon *opinions*, and can be nothing but *opinion* itself. And the question whether such publications are true or false, can never be matter of *law*, except under some government which undertakes to establish *by law* what truth is in respect to morality or government, and to forbid the expression of opposite opinions.

The modes in which men may express their opinions are as various as the natures of different individuals, and it is impossible to define bounds or limitations within which the expression may be confined.

But it is not doubted that publications may be made with *intent* to overthrow by unlawful means the institutions of government. These cannot be defended as expressions of opinion. They are not aimed to produce conviction. Obscene books and pictures, writings teaching what are universally acknowledged to be crimes, are not discussion and debate, and may doubtless be condemned, and the authors and publisher of them punished. There is a universal consensus to the point that social peace and order by means of government shall be preserved. This is necessary even to free discussion.

The question, therefore, must always be whether any writing charged to be libellous is an honest, *bona fide* attempt to express opinions really entertained, or a dishonest effort to inculcate vice and crime. Manifestly this must always be a question of *fact*, and of fact alone. The writing may be, and usually is, important *evidence* of the fact, but cannot su-

persede other evidence. The circumstances under which it was written,—the other parts of the paper not charged as libellous,—the character and conduct of the writer—all these constitute information which may be laid before the jury to enable it to ascertain the vital and material fact of *intent*.

h. It follows as a corrollary from the foregoing that there cannot be any further definition of a public or seditious libel, than that it is a publication intended to be hostile to government and to bring it into contempt. This may be said to be universally admitted, both by lawyers and statesmen. It has never been otherwise defined.

Lord Lansdowne, in H. L., 41 Parl. Deb., 7–15.

Protest of the Peers, Ibid, 747.

Brougham's Contributions (London and Glasgow, 1856), vol. 3) p. 157.

Hamilton. (Croswell's Case, Works, New York, 1886, vol 7, pp. 334, 343).

Sir James Mackintosh (Works, London, 1846, vol. 3, p. 249).

The impossibility of definition is well stated by Sir James Macintosh: "Those who slowly "built up the fabric of our laws never at- "tempted anything so absurd as to define by "any precise rule the obscure and shifting "boundaries which divide libel from history "or free discussion. It is a subject which, "from its nature, admits neither rules or defi-

"nitions. The same words may be perfectly
"innocent in one case and most mischievous
"and libellous in another. A change of cir-
"cumstances, often apparently slight, is suf-
"ficient to make the whole difference. These
"changes (which may be as numerous as the
"variety of human intentions and conditions)
"can never be foreseen or comprehended
"under any legal definitions, and the framers
"of our law have never attempted to subject
"them to such definitions.

i. If the truth of doctrines may be evidenced by their salutary effects, no further defense of those above stated would be needed than a simple reference to history. It is a melancholy task to peruse the criminal records of England while the doctrine of Lord Mansfield was enforced, and observe the chequered spectacle—a host of prosecutions instituted, often for the expression of the most innocent, or even laudable, opinions—verdicts extorted from juries against their will, and at other times juries defying the instructions of Courts. But since the passage of the Libel Act of Mr. Fox the scene is entirely changed. Prosecutions for public libel are extremely rare; and the notion that the existence of government or morality can be seriously threatened by any publication of mere opinions has been dismissed as a silly delusion.

3. The preceding discussion has made it clear that for more than twenty years immediately preceding the adoption of the Federal Constitution there were two rival views concerning the liberty of the press in England, one being that declared by Lord Mansfield, namely, that "a man may print what he pleases without a license," but at the risk of having what he prints declared by a fixed magistracy to be a libel and of being subjected to punishment therefor without the privilege of defending his innocence before a jury; and the other, that which vouchsafed to him this privilege, and which was well stated by Lord Kenyon as follows: "After all, the truth "of the matter, as to the liberty of the press, is "very simple when stripped of the ornaments "of speech, and a man of plain common sense "may easily understand it. It is neither more "nor less than this: that a man may publish "anything which twelve of his countrymen "think is not blamable, but that he ought to "be punished if he publishes what is blama-"ble. This, in plain common sense, is the "substance of all that has been said upon the "subject." (Rex *vs.* Cuthill, 27 St. Tr., 675.) If, as we have endeavored to show, Mr. Fox's act was but declaratory of the pre-existing law, it is quite immaterial that the above definition was given some two years after the passage of that act.

The important question is, in which sense the term "Liberty of the Press" was employed in the First Amendment. The preceding discussion seems to relieve that question of doubt. How can we doubt that the framers of the Constitution, themselves devoted to free principles

of government, detesting the doctrines of arbitrary power, with the spectacle then actually before their eyes of the conflict going on in England between these rival views—a struggle in which all who had been their friends were upon the popular side—a struggle substantially finished by the triumph of that side—intended by the phrase "Liberty of the Press" precisely that liberty which was not only guarded by exemption from previous restraint, but defended by the safeguard of a jury trial?

4. But such a question can hardly be raised since the decision of this Court in Boyd *vs.* The United States (116 U. S., 616). In that case the validity of the legislation authorizing the issuing of a warrant in revenue cases for the seizure of books was challenged and determined in the negative. The question was declared to turn upon the import of the language in the Fourth Amendment, "unreasonable searches and seizures," and in order to ascertain this, the Court, setting the example which we have endeavored to follow in this brief, went back to the struggle in England over the question of general warrants, which was terminated by the memorable judgment of Lord Camden in Entick *vs.* Carrington (19 St. Tr., 1029); and, declaring that that contest must have been familiar to the framers of the Constitution, did not hesitate to say that they must have entertained the same views which the lovers of liberty at that time entertained, both in England and in this country, and held the warrants to be illegal.

That struggle over general warrants of seizure was but a part of the struggle for the liberty of the press which has been herein recounted, as will be seen by a reference to Lord Camden's judgment; and the inference that the framers of the Constitution entertained the same views respecting general warrants as those declared by that great Judge is no clearer than the inference that by "Liberty of the Press" they intended the same liberty which, in that same struggle, he and the other advocates of popular rights asserted and successfully maintained. It cannot be that men who at that time thought it necessary to insert in the American Constitution provisions to forever secure the liberty of the press, designed simply to protect the press against a censorship. The censorship had been dead for a century, and there was no possibility or thought of reviving it. There had been two parties upon the question of free discussion. Its enemies took the ground that the liberty of the press consisted simply in the absence of a censorship. Its friends asserted that whether a publication is innocent or criminal, must be left to the determination of a jury. It must have been this view which the founders of the American Commonwealths, both State and National, determined to incorporate into the fundamental law.

5. But, in truth, while the obnoxious practice of issuing general warrants was but part of the system of restraint upon free discussion, and the First and Fourth Amendments were thus

aimed at substantially the same abuse of power, it may be said with equal truth that *all* of the ten amendments proposed by the First Congress had the same common object. They contain a precise enumeration of all the principal doctrines which had been asserted by the popular party in England during the entire struggle against prerogative and power, and which together constituted what was then, and still is, known as Civil Liberty. Each one of them points to a particular liberty which had long been striven for, and stamps it as something which was to be forever thereafter deemed as finally secured and placed beyond future peril.

6. The contemporaneous exposition by those principally instrumental in the framing of the Constitution is in entire accordance with the foregoing views. It is nowhere better expressed than in Hamilton's masterly brief in the celebrated case of The People *vs.* Croswell, an indictment for a libel upon Thomas Jefferson, President of the United States.

"I.—The liberty of the press consists in the "right to publish *with impunity* truth, with "good motives, for justifiable ends, though re- "flecting on government, magistracy or indi- "viduals.

"II.—That the allowance of this right is es- "sential to the preservation of free government "—the disallowance of it fatal.

" III.—That its abuse is to be guarded against " by subjecting the exercise of it to the an- " imadversion and control of the tribunals of " justice ; *but that this control cannot safely* " *be entrusted to a permanent body of magis-* " *tracy, and requires the effectual co-operation* " *of Court and jury.*

" IV.—That to confine the jury to the mere " question of publication and the application of " terms, without the right of inquiry into the " intent or tendency, referring to the Court the " exclusive right of pronouncing upon the " construction, tendency and intent of the " alleged libel, is calculated to render nugatory " the function of the jury, enabling the Court " to make a libel of any writing whatsoever, the " most innocent or commendable.

" V.—That it is the general rule of criminal " law, that the intent constitutes the crime, and " that it is equally a general rule that the " intent, mind, or *quo animo*, is an inference of " fact to be drawn by the jury.

" VI.—That if there are exceptions to this " rule they are confined to cases in which not " only the principal fact, but its circumstances, " can be and are defined by statute, or judicial " precedent.

" VII.—That in respect to libel there is no

"such specific and precise definition of facts "and circumstances to be found; that conse- "quently it is difficult, if not impossible, to "pronounce that any libel is, *per se* and exclu- "sive of all circumstances, libellous; that its "libellous character must depend upon intent "and tendency, the one and the other being "matters of fact."

This precise and elegant statement of the law was supported by a luminous argument reviewing the whole law of libel and its history, showing that it was the ancient law, and that Mr. Fox's act was declaratory merely. It received the full assent of Kent, afterwards Chancellor, whose opinion contains a most elaborate scrutiny of the doctrine of Lord Mansfield, and declares that he and the judges who followed him had "involved themselves in inconsistency "and paradox; and I am induced to believe "that it is a departure from the ancient, sim- "ple and true history of the trial by jury in "criminal cases."

Hamilton's Works (N. Y., 1886), Vol. 7, pp. 333 *et seq.*

People *vs.* Croswell, 3 Johns. Cases, 336, 365.

7. The Alien and Sedition Law of 1798 contained provisions for the punishment of libels against the government which became the subject of violent controversy. These provisions were deemed unconstitutional by many of the most

enlightened statesmen, including Madison, the author of the Report of the Virginia House of Delegates. Their unconstitutionality seems to have been conceded in the discussion herein referred to in the U. S. Senate in 1836. But no attempt was made by this statute to define what publications should be punishable so as to restrict the office, or the power, of a jury. The design simply was to make libels upon the U. S. Government punishable just as libels against the British Government had always been punishable at common law. This could not be done without the aid of an express statute, for the Courts of the United States have no common law jurisdiction in criminal cases (United States *vs.* Hudson, 7 Cr., 33). It could with great plausibility be argued that that government should not remain stripped of power to defend itself against any libel however seditious. And this law proceeded upon a full acknowledgment of the doctrine of the liberty of the press as herein maintained. It sought to lay down no new definition of the law of libel, but made that offense to consist in publications designed and tending to overthrow the government or bring it into contempt, thus making the *intent* an essential element of the crime. And, moreover, it allowed, by express provisions, that the truth might be proved by way of defense ; and *clothed the jury with the right to determine both the law and the fact.*

Act of July 14th, 1798. Stat. at Large, Vol. 1, page 596.

IV.—If the foregoing discussion has been in any degree successful, it has established that the phrase "Liberty of the Press," as employed in the First Amendment, imported that measure of liberty which permits, without previous restraint, the publication of any writing whatever, and without the restraint of any *subsequent penalty*, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous.

The immediate purpose and effect of the amendment was to place this great safeguard of liberty beyond the peril of the exercise even of the *legislative* power.

1. The framers of our Constitution did not require to be taught that all safeguards for the protection of rights must be erected against the *possessors of power*, whoever they might be; nor did they fail to perceive that the doing away with a monarch had no effect to destroy, but only to *transfer*, power. It was equally clear to them that in such a division as they proposed of legislative, executive and judical powers, the legislature would be the superior body, and encroachments from that quarter were most to be apprehended.

   The Federalist, Nos. 48 and 49.

2. It was not from the executive or the judicial departments that they apprehended any invasions of the liberty of the press. They had left

the former without any pretense for the exertion of a restraining authority; and the latter, being in no manner bound to, or dependent upon, a permanent or hereditary sovereign, was quite unlikely to become united in any such endeavor. But the case was quite different with the Legislature. Its power would be wielded by a *majority*, which might easily be influenced to the adoption of questionable measures by a belief that its supremacy could thus be perpetuated. Striking directly at this danger, they thus framed their safeguard: "*Congress shall make no law* * * * * * abridging the freedom of "speech, or of the press." This bestowed upon the people of the United States a protection which could not be gained in Great Britain, and constituted the final stage in the security of the liberty of the press.

3. The result of the contest in England was to preclude *judges*—the fixed and permanent magistracy—from making the question of the guilt or innocence of a publication a question of *law*, and taking it away from the jury by *judicial definitions* of what publications should be deemed libellous. Such definitions, however, may just as well be made by legislative *enactment*. That power Parliament still retained. But the framers of the Constitution went further and forever precluded Congress from making any such *legislative* definitions. Congress, therefore, cannot *describe* any publication by any narrower description than *seditious*, *libellous*, or equivelant terms, and declare that the

publications so described shall be *deemed to be* seditions, or libellous, and punishable as such.

And a very learned writer is of opinion that under free governments like ours there is no place for any system of repressing libellous publications except when made with intent to incite rebellion or civil war.

Cooley Const. Limitations, 526.

V.—Having determined the import of the term "freedom of the press," as employed in the First Amendment, we are now prepared for the main inquiry whether the statute in question is a law *abridging* that freedom. That such is its character is very clear.

1. That freedom includes not only the liberty of *printing*, but the liberty of *publishing*. The former would be empty indeed without the latter. And the liberty of *publishing* must be co-extensive with the liberty of *printing*. And what is *publishing?* It is the *communication to others* of what is printed; in other words, it is *circulating*. *Publishing* and *circulating* are admitted to be synonymous (*Ex parte* Jackson, 96 U. S.). And what was the liberty of *publishing*, which existed at the time of the adoption of the Constitution? It was the liberty of *circulating* printed matter in all practicable and permissible forms, of which that by

mail was by far the principal mode. It included *letters*, *newspapers* and *packets*.

2. Does the statute in question abridge the freedom of *circulation?* We make no effort to conceal the embarassment which attends any discussion of this question since the decision of this Court in *Ex parte* Jackson (96 U. S., 727). That the statute was within the *powers* of Congress, aside from any express restriction, it would seem, was silently assumed, rather than considered and determined by that decision; but the point that it was invalidated by the restriction seems to have been made and passed upon. The undersigned, however, cannot but think that it was inadequately presented, and this Court has not been in the habit of placing a vital question of constitutional law beyond the reach of agitation until its merits have been thoroughly discussed. The attention of the Court is, most respectfully, but earnestly, solicited to the following considerations which seem to demonstrate that the statute does abridge the freedom of *circulation*, and, by consequence, the freedom of the press.

a. The meaning of the term "*abridge*" will surely not be disputed. It is not synonymous with *destroy*, *deprive*, or *take wholly away*. It means to *shorten*, to *curtail*, to *contract*, to *diminish*. And may we not take into consideration the extreme care and apprehension

concerning the freedom of the press, which at the time of the adoption of the Constitution had just been sharpened and intensified into an almost passionate jealousy, and say that the term "abridge" cannot be deprived of its special significance, or be made to import anything less than that Congress must leave that freedom absolutely unimpaired?

b. The principal, if not the only mode of circulating, at the time of the adoption of the Constitution, such printed matter as newspapers, pamphlets and circulars, was by *mail.* It has always been so, and must become more and more so as society advances. As we have seen, this service constitutes a *public franchise*, the exercise of which is a recognized duty of government, and in order to exercise which government has the right to suppress all rivalry, and assert for itself the exclusive title to receive tolls. No State can, against the will of Congress, establish a mail service between it and other States by treaty with such other States, nor even upon its own territory for its own citizens. Congress has already exercised its powers by forbidding the carriage of letters or packets over post roads or routes, or between any places where a mail service exists, in any other way than through its own mail (R. S., 3982). Aside from this proposition the statute in question takes away from every citizen *the ordinary and principal means of circulating* any matter concerning lotteries

which may be contained in letters, newspapers, pamphlets or circulars. We submit it to candid minds to say whether the freedom of circulating printed matter, which is admitted to be synonymous with the freedom of the press, is *shortened*, *curtailed*, *contracted*, *diminished*, or, in other words, *abridged*, when the *natural*, *appropriate* and *principal means* by which such matter may be circulated is absolutely taken away.

c. Nay, more; the statute forbids the carriage by mail of any newspaper, circular, pamphlet or publication of any kind containing matter concerning, it may be, a thousand subjects, if it *also* contains "any advertisement of any lottery "or gift enterprise of any kind offering prizes "dependent upon any lot or chance, or con-"taining any list of the prizes awarded at "the drawings of any such lottery or gift "enterprise." Thus, no man can circulate a a newspaper in any State except *upon condition* that he consents to forego the benefit to be derived from any such advertisement, although it may be entirely legal in such State. Of course the conditions may, if this be allowed, be extended to any other advertisement relating to any business or subject; and thus the *power* is directly asserted by this legislation of Congress to control the character of the whole newspaper press; for no one will pretend that the publication of newspapers is possible, on any large scale if, the benefit of the mail service is denied to

them. If this *power* exists, what stands in the way of excluding newspapers which contain matters advocating the tariff or free trade, or the doctrines, or the candidates, of a particular party?

d. And still further: *The statute creates a censorship.* Had it forbidden only the depositing in the mail of the matter described, it might be urged that every one was at liberty to make such deposit, subject to the hazard of being indicted and punished, and, therefore, that there was no *previous restraint.* But the prohibition forbids the postmaster from *delivering* any such newspaper, circular, pamphlet or publication. It arrests *publication*, for it arrests the *communication* of the matter to the public, or to those for whom it is intended. *And whether publication should be thus arrested is submitted to the judgment of a postmaster!* This is a perfect *restoration of the censorship.* That, indeed, as formerly existing, was interposed a stage earlier. It forbade the *printing* until the *imprimatur* was given. But this is interposed *before publication*, which is the essence of the censorship. It is *previous restraint.* The withholding of the *tradatur* of the postmaster is as effective as the withholding of the *imprimatur* of the censor.

e. There is little need of referring to Sections

2 and 3 of the Act of September 19, 1890. They seem to trample with contempt upon the Constitution. They deny the benefits of the mail to matter, not on account of the subject to which it relates, but solely on account of the *business* in which the person to whom the matter is addressed is engaged! And it makes the judgment, or rather the *guess*, of the postmaster final and conclusive upon the question of what business the person is engaged in, and authorizes the postmaster to publish a libel upon his character by stamping sealed matter addressed to him as *fraudulent!* A citizen above reproach may have occasion to communicate matter having no relation to any lottery business, to a person not engaged, so far as he knows, in any lottery business—it may be a communication upon the most important and sacred concerns of human life—and yet it may be refused delivery, stamped "*fraudulent*" by the postmaster, and returned to him! And, more flagrant still—registered letters addressed to any person acting as an agent of any lottery may be dealt with in the same manner. And the public advertisement in a newspaper—it may have been placed there without authority, and even by the hand of an enemy—that remittances to a lottery may be made to a person by registered letter, is declared to be sufficient evidence that such person is in fact such agent! And no way is apparent in which a person having in this manner once been deemed an agent, may afterwards, by proof that he is not, or by actually ceasing to be an agent, escape the disability!

These sections are illustrative of the spirit which inspired this whole act. They show how easy it is for men by dwelling upon the supposed importance of a particular *end*, not only to magnify that out of all proportion to its real consequence, but to regard all *means* for its attainment as equally laudable with the end. Any suggestions that there are other important objects which would be sacrificed by the employment of the means proposed, or that such employment is forbidden by great constitutional safeguards, are viewed with unreflecting incredulity, or as evidences of hostility towards the objects which seem to them so important.

3. It may possibly be suggested that the purpose of the act in question is not in any manner to impair or abridge *free discussion* of any question, but to break up a certain *business* or certain *practices*. If such suggestion is designed to show that the statute is limited, or should be *construed* to be limited, to such acts as are parts of some *business transaction* in relation to a lottery, it must be rejected. Whatever is fairly embraced within the language of the act must be deemed to have been intended by it. Courts cannot cut down the scope of an enactment as marked out by its language on the basis of a supposal that Congress must be deemed to have intended only what was *constitutional* and *reasonable*. This may be done when the language employed suggests a doubt, but is quite inadmissible where the doubt is whether the

Legislature has power to do what it has plainly attempted. Courts cannot legislate.

One learned Judge, startled by the sweeping scope of the language, which as clearly embraces the mailing of the prohibited matter *to* lottery dealers as *by* lottery dealers, has declared it *incredible* that Congress could have intended to punish a man for a criminal offense who had simply written a letter to a lottery dealer, even if it were to order a ticket, and has cut down the statute so as to limit its prohibitions to lottery dealers. (United States *vs.* Clark, 22 Fed. Rep., 708.) If a statute embraces provisions, some of which are within, and some beyond the legislative power, the former may be saved if they can be *read separately* from the latter; but the separation cannot be effected by a heroic construction. Courts must *untie* knots, not *cut* them. "It would cer-
"tainly be dangerous if the Legislature could
"set a net large enough to catch all possible
"offenders, and leave it to the Courts to step
"inside and say who could rightfully be de-
"tained and who should be set at large. This
"would, to some extent, substitute the judicial
"for the legislative department of govern-
"ment." (United States *vs.* Reese, 92 U. S., 214, 221.)

Trade-mark Cases, 100 U. S., 92.
Allen *vs.* Louisiana, 103 U. S, 80.

4. Our argument in no manner involves the consequence that the existing legislation of Congress, excluding obscene books and pictures

from the mails, is invalid, as abridging the freedom of speech.

a. It will be perceived upon referring to the observations concerning this legislation hereinbefore made, that the power and the duty of Congress to refrain from so exercising its express powers as to facilitate the commission of crime was distinctly admitted. What was denied was that Congress had the power to exclude matter as being criminal which was not criminal *per se*, which was not regarded as criminal at the time of the adoption of the Constitution, which was then permitted, if not encouraged, in most, if not all the Colonies, was still permitted and protected in some of the States, and over which, as being criminal or innocent, Congress had no direct power whatever.

b. That Congress has power to exclude from the mail any publication or letter tending to promote murder, arson, burglary, larceny—anything which is *malum in se*—or anything which tends to facilitate the commission of acts which it has power under the Constitution to declare to be crimes, and punish as such—piracy, and counterfeiting the coin, for instance—is not questioned.

c. Hence it has power to forbid the mailing or delivery of obscene books or pictures. The publication or circulation of these was a perfectly well known offense at common law. It was, in the fullest sense, *malum prohibitum*. It is no part of the doctrine of the freedom of the press that any one has a right to publish or circulate matter *designed* to promote the commission of crime. But whether it is so designed or not can never be determined except by a trial upon an indictment for some form of libel, or offense in the nature of libel. Mr. Dicey has aptly expressed this truth in saying: "The liberty of the press, then, is "in England simply one result of the univer- "sal predominance of the law of the land. "The terms 'liberty of the press,' 'press "offenses,' 'censorship of the press,' are all "unknown to English lawyers simply because "any offense which can be committed through "the press *is some form of libel*, and is gov- "erned in substance by the ordinary law of "defamation" (Dicey's Laws of the Constitution, 286), and any proceeding under the special statutes in England, or in our States, are of the same nature as indictments for libel, and subject to all the rules which apply to the trial of such indictments.

d. Our statute making the circulation by mail of such matter a penal offense, follows rigidly the principle which governs such indictments. There must be a jury trial, and the question whether the books or pictures are obscene—

in other words, whether they are libellous—is always an issue of fact determinable by the jury alone.

e. But if Congress had undertaken to describe and condemn *particular* books or publications as promotive of murder, arson or any other crime, or as being obscene, and make the circulation of those a penal offense, thus *taking away from the jury* the determination of the question of their guilty tendency, the prohibition contained in the First Amendment would have been distinctly violated.

f. It is precisely here that the legislation under notice exhibits its vice. It leaves to no jury the power to determine whether any publication relating to a lottery—a remonstrance against them, an argument for them, an advertisement of them, any expression of views concerning them—is of evil design and tendency. If the matter *relates* to lotteries, proof of mailing is enough. All else is a question of law and the jury *must* convict.

g. The progress of the legislation on this subject is interesting. The first legislators were animated with some regard for constitutional principles, and thought to save them by excluding matter relating to such lotteries only

as were *illegal*. Their successors finding that the use of this word was enough to deprive the statute of effect, were bold enough to leave it out. The last artificers of restraint, counting any means whatever as permissible, seem to have thought it a merit in a cause which appeared to them so praiseworthy, albeit one which the Constitution never committed to their charge, to trample upon principles which it has been the work of ages to establish.

Third Point.—It is very respectfully submitted that the consideration and decision of the questions herein discussed should not be embarrassed by the judgment in *Ex parte* Jackson (96 U. S., 727).

1. No reflection is intended upon any of the learned counsel who argued that case, but, judging from the report, most important questions really involved were wholly overlooked.

a. The question whether Congress could exercise a power of excluding matter from the mails solely because of the *subject* to which it related, and not with any view of making the service more practicable, convenient and useful seems not to have been debated.

b. Nor does the question seem to have been debated whether Congress could employ an *incidental* power in order to repress a business or practise within a State over which it had under the Constitution no control.

2. It seems to have been hastily assumed that, inasmuch as the *regulation* of the whole postal system was lodged with Congress, any laws passed by Congress in relation to that system must be deemed to be *regulation;* and that "the right to designate "what should be carried, necessarily involves the "right to determine what should be excluded." It was, indeed, admitted that this power must be exercised "consistently with rights reserved to "the people," but none such were recognized except that of exemption from unreasonable searches, and of the freedom of the press. But that there were rights in the people of the several States to pursue such calling in life as they might choose, and to have an equal participation in all the benefits and facilities afforded by the General Government without being subjected to injurious discrimination on account of their calling, was, apparently, a matter not supposed to be involved.

With the exceptions above stated, it seems to have been assumed that the power of *regulating* the postal service carried with it the power of excluding any matter from the mails which Congress, in the exercise of an uncontrollable discretion, might determine.

All this seems to be wholly irreconcilable with the uniform doctrine of this Court, illustrated by numerous decisions, that in determining the ques-

tion of the validity of any act of a State legislature, or of Congress, it will distinguish between a law which *regulates* and a law which *takes away;* that in the case of an exercise of powers asserted and defended as *incidental*, it will inquire whether they are *really* incidental; and to that end will inquire, on the one hand, whether there is any *just relation* between the *means* which the legislature employs and any *end* within the express power of the legislature, and, on the other, whether the manifest *purpose* of the legislature is not to compass some object not within its control.

3. Again, upon the question whether the law abridged the freedom of the press the doctrine declared seems to the undersigned open to much question, and induces the belief that it could not have been adequately presented in argument.

That the statute did abridge the freedom of the press unless it permitted the excluded matter to be otherwise circulated was admitted; but the power of Congress to prohibit other modes of circulating matter excluded from the mails was denied. And whether Congress has power to prohibit the transmission of *any* printed matter was apparently a question upon which the Court entertained no clear and definite opinion. The opinion suggests (p. 735) that Congress "may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters and of news-

"papers and pamphlets *when not sent as mer-*
"*chandise*; but further than this its power can-
"not extend."

What is the meaning of sending *as merchandise?* Is it designed to draw a distinction between the sending of *packages* of newspapers and pamphlets by private carriers, and the sending of a single copy at regular times to a subscriber? Is this a distinction upon which a decision of the question of abridging the freedom of the press may be made to securely stand?

And is there any doubt that Congress in exercising the public franchise of establishing and maintaining a mail service may prohibit the discharge of any part of that service by private individuals or by the States, just as a State may probibit its citizens from exercising any public franchise such as those of highways or ferries? And does the question of what is properly *mail matter*, and, as such, subject to restriction from private carriage, depend on what happened to be ordinary mail matter when the Constitution was adopted? And can the question whether the statute abridges the freedom of circulation, which the opinion admits is tantamount to the freedom of publishing, be determined without distinctly deciding whether Congress may prevent the circulation of any printed matter in any other way than by mail, and how far its power in that direction extends?

4. The practical and logical effect of the decision is this. There are, as there were at the time of the adoption of the Constitution, *two* methods by

which printed matter might be circulated; one *public*, and the other *private*.

The former was the principal one upon which the whole public mainly relied. It was *constant, regular, abundant and sure*; and, moreover, it had the capacity by law, of excluding the other from the field, if not absolutely, at least for the most part, and of thus increasing its own efficiency. There was, and is, a similar, if not as great, difference between the methods as between the sending of merchandise by railroad and by private conveyance. This *principal* method of circulation is denied to certain printed matter, and yet it is declared that the *freedom of circulation* is not abridged!

It is quite evident that this conclusion proceeds upon the view—it can stand upon no other—that the freedom of circulating, admitted to be tantamount to freedom of publishing, is not abridged *so long as the citizen has the right to circulate printed matter in any private manner which he alone, or with the assistance of others, may contrive;* and has reference only to the *right* to circulate, and no reference to any right to enjoy the *usual public means* of circulating which his fellow citizens enjoy, and for which he is taxed and made to pay in common with them.

5. Against this view it seems to us more in accordance with sense and reason to say that the emphatic declaration of the Constitution made to forever preserve the principal safeguard of liberty, that Congress should not pass any law *abridging* the freedom of the press is violated by any law

which takes away *any of the ordinary* methods of circulating printed matter.

6. There are two principal questions in this case, and none more important have ever been submitted to this tribunal. The *first* is whether Congress may, in virtue of its authority to make laws *necessary and proper* in order to carry into execution the powers *expressly* granted to it, pass a law *manifestly* and *avowedly* for the sole purpose of suppressing a business within a State, which that State has the right to authorize, and over which Congress has no direct control. The *second* is whether a law prohibiting the circulation of certain written and printed matter open to no objection save that it relates to a certain business not criminal in itself, and permitted by the laws of some of the States, by the ordinary and usual means of circulation provided by law for the public generally, abridges the freedom of circulation, and, by consequence, the freedom of the press.

Except so far as these question have been considered in the case of *Ex parte* Jackson, it is believe that they have never hitherto been considered in this Court, and surely it has never yet allowed a single determination, even when made after adequate argument, to foreclose further debate.

Lastly.—The prayer of the petitioner for writs of *habeas corpus* and *certiorari* should be granted.

JAMES C. CARTER,
Of Counsel for Petitioner.

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JAMES H. McKE

SUPREME COURT OF THE UNITED STATES.

October Term, 1891.

No. 8 and 9, Original.

EX PARTE GEORGE W. DUPRÉ.

THOS. J. SEMMES,
Of Counsel for Petitioner.

L. GRAHAM & SON, 99, 101, 103 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1891.

No. 8 and 9, Original.

EX PARTE GEORGE W. DUPRÉ.

The first project for the establishment of a postal system in America was suggested in the winter of 1672-3 by Governor Lovelace of New York. He proposed to have sworn messengers to carry *letters and small packets* between New York and Boston.

2 Broadhead's Hist. of N. Y. 196-7.

The suggestion was not carried into execution, but Governor Dongan revived it in 1685.

He proposed to establish post houses along the coast from Carolina to Nova Scotia *for the better correspondence between the colonies of America*, and he ordained in Council the establishment of a post-office and fixed the rates of postage. Id. p. 413.

Prior to this, the postal revenues of England had been settled upon the Duke of York to sustain the dignity of his title, Id. p. 434; and the right to carry *letters and packets* in the colonies was occasionally farmed out, one-tenth of the revenue being reserved to the Duke of York; 3 Col. Doc. 349.

When the Duke ascended the throne, the postal revenue vested in the crown, and in 1685, the same year that Gov. Dongan's ordinance was adopted in New York, Randolph

was appointed deputy post-master of New England by Lord Treasurer Rochester; two years after the same Lord Treasurer appointed William Bogardus to be post-master for the province of New York 2 Brod. Hist. of N. Y. 434 and 406.

Between the years 1689 and 1692, Thomas Neale obtained a patent to establish post-offices throughout the American colonies, and on the 4th of April, 1692, he appointed Andrew Hamilton (governor of New Jersey) his deputy for all the plantations. Governor Hamilton brought the subject before Governor Fletcher and the New York Legislature, and an act to encourage a post-office was immediately passed by them.

4 Col. Doc. 200.

We discover no further data with respect to the postal service in America until 1710.

Prior to that year a system had been established by Act of Parliament, in England and Scotland only; but in 1710 Parliament passed a general law, repealing all previous enactments, and providing for a general post-office for and throughout Great Britain and Ireland, the colonies and plantations, viz: North America and the West Indies, and all of her majesty's dominions and territories. The system therein provided for was to go into operation on the first of June, 1711. There was to be one general letter office in some convenient place in London, from whence ALL LETTERS AND PACKETS WHATSOEVER might be sent into any part of the kingdom of Great Britain and Ireland, North America, the West Indies, any other of her majesty's dominions or territories, and to any kingdom or country beyond sea; and at this office all returns and answers were to be likewise received. The Queen was to appoint, from time to time, a postmaster-general, who was to appoint deputies, and *no other persons* were to be permitted to carry *letters and packets*, except such as con

cerned goods taken by common carriers; such letters were to be permitted to accompany the goods. A chief letter office was to be erected by the postmaster-general at Edinburgh, Dublin, and *New York*, and one in *each American colony*, and in each West India Island; and he was to appoint deputies to manage them.

4 St. at Large [British], ed. of 1769, p. 434.

Under this act a postal system was established throughout the colonies, and maintained until the outbreak of the Revolutionary War. Among the deputy postmaster-generals, under whose successive supervision the system was conducted, were Sir Alexander Spottswood, Kt., of Virginia, and Benjamin Franklin, of Pennsylvania.

When the rupture between the colonies and the home government had ripened into open war, the people here were necessarily deprived of the convenience and advantages of the postal service thus established. But they had enjoyed its regular operations too long to abandon the plan, and at the second session of the Continental Congress—the first session after the breaking out of hostilities—a general post-office was organized by the appointment of Dr. Franklin as postmaster-general of the United Colonies. The powers and instructions given him were, to hold his office at Philadelphia, to appoint deputies, and to establish a line of posts from Falmouth, Mass., to Savannah, Georgia, with such cross-posts as he should judge proper.

Journals of Cont. Cong., Vol. 1, p. 165, July 26, 1775.

No other directions were given by Congress. This act was, therefore, only the adoption of a *means* whereby the long established postal service might be continued under continental authority, *as it had existed under the British statute*. The authority to establish a line of posts, conferred upon Dr. Franklin by his appointment, could not be construed to comprehend also a power to determine

what letters and packets should, and what should not, constitute mail matter, any more than his appointment as deputy postmaster-general of the Colonies, under the British statute of 1710, could be construed into such an authorization. When he was appointed by the British postmaster-general, he was appointed only for the purpose of executing in the Colonies the provisions of the statute, which imposed the duty of receiving, transporting and delivering *all letters and packets whatsoever*.

The postal system continued under this organization until 1781, when the Articles of Confederation invested Congress with power to establish and regulate post-offices from one State to another, and to exact postage to defray the expense. Art. 9.

In this condition was the post-office system at the time our present Constitution was adopted.

The mail matter referred to in the British statute of 1710, and in the ordinances of the colonial authorities, is described as *letters and small packets*. It is a matter of history that the mail matter of the period was *sealed letters and small packets*. During all this period, and for many years afterward down to a late period, lotteries were not regarded as immoral enterprises, and were used by the British Parliament, by the Continental Congress, and by the Congress of the United States, and by the Legislatures of the several States, as a means of raising money for various purposes.

The public school and the university system of New York is founded on lotteries; the public schools were supported by lotteries till 1830. Union College received $434,000 from lotteries; Hamilton College, $40,000; the College of Physicians, $30,000; Columbia College was granted the right to run a lottery as early as 1746.

The state house at Albany was built in 1804 with lottery money. In 1790, when New York and Philadel-

phia were competing for the location of the Capital of the United States, the City of New York not only offered to give the Federal Government all the ground it needed for public buildings, but also to construct the buildings; and to raise the necessary funds a lottery was chartered. The improvement of the Hudson river was effected by lottery money, the quarantine service was maintained, and the Historical Society of New York was established by lottery funds. The Continental Congress of 1776 chartered a lottery company to raise money for the American troops.

In 1784 the Pennsylvania Legislature incorporated the Pennsylvania State Lottery to raise money for important works of public improvement, viz: for the construction of high roads from Philadelphia westward; for the improvement of the Schuylkill, Lehigh, Delaware, Susquehanna and other streams; lottery funds were used to pave Philadelphia, Lancaster, and other towns; to build bridges, to erect academies, and thirty-nine churches; all denominations except the Quakers used lottery money for church building.

Since 1760 Rhode Island granted no less than 283 lottery charters; for nearly a century it obtained three fourths of its revenues, not only State, but county and local revenues, from lotteries.

In New Hampshire Portsmouth College was the recipient of lottery favors. It was granted a lottery privilege in 1737, which was renewed in 1795, and again in 1812.

In that State rivers were improved, and roads and canals constructed by means of lotteries. Massachusetts granted to Harvard University a lottery privilege as early as 1769, renewed it in 1780 and again in 1808. Faneuil Hall was rebuilt with lottery money; by the same means the wharves of Boston were rebuilt and its streets were widened and paved. Funds for the improvement of rivers and the

construction of roads and bridges were raised by the sale of lottery tickets.

But why continue the catalogue? All the original thirteen States, North and South, authorized lotteries as a means of raising money for public purposes.

The first legislative act passed for the suppression of lotteries in this country is due to the influence of the Quakers, who in 1759 induced the colony of Pennsylvania to prohibit lotteries and plays; the lottery and the drama being regarded as twin evils.

Against this Act the Philadelphia College, now the University of Pennsylvania, protested, on the ground that all lotteries chartered by the Colony were for necessary and charitable purposes, and their suppression would be a fatal blow to the cause of education.

The act was repealed.

When the Constitution was under discussion, the people of the colonies had enjoyed the right of sending through the public post *all letters and small packets whatsoever*. This right they desired to preserve, and the proposed general government presented itself as the most efficient agent to organize and continue a system of mail transportation. The question was not, "What shall constitute mail matter?" but "Who shall transport and deliver that mail matter, which had already been defined by long usage." Hence Congress was empowered "to establish postoffices and post roads."

This is a grant of power in the nature of a franchise. It is distinguishable from franchise in the single particular, that it is not vested by the sovereign in a *subject*.

When the grant was made, it flowed from the sovereign States, or if you choose from the sovereign people of the States, to a common central power in process of creation; a power that was to be the agent of the States, and a government that was not to exercise any functions but such as were vested in it by its sovereign creator.

The franchise might have been conferred upon a mere corporation, and if it had been, the established principles respecting franchises which flow from the sovereign to the subject would apply. It is therefore the duty of Congress to exercise the power thus conferred on it for the benefit of all the people of the United States, a duty imposed by the constitution, which gives rise to an obligation not enforceable in courts of law, it is true, for in that mode no obligation of the government can be enforced, but which is nevertheless an obligation. The postal service in its nature is not susceptible of effective performance by the agency of the States; for the States are forbidden by the constitution to enter into agreements with one another without the consent of Congress; without conventions satisfactory postal arrangements would be impracticable.

From the First to the Forty-second Congress no provision appears in any of the various acts passed, which attempts to interfere with the long established character of mail matter.

In 1797 we find an act which provides that no newspapers shall be received by the deputy post-masters to be conveyed by post, unless they are sufficiently dried and enclosed in proper wrappers.

1 Stat. at L. 512.

Congress has always limited the weight and bulk of packets of any kind, and the nature of the substances to be put in the mails. The only effort prior to 1872, to prohibit the conveyance of established mail matter, was made in 1836. President Jackson recommended the passage of an Act to prohibit the circulation of "incendiary" papers through the mails.

Mr. Clay said that Congress could "not pass any law interfering with the subject in any shape or form whatever. The evil complained of was the circulation of papers having a certain tendency. The papers unless circulated,

and while in the post-office, or in the mail, can do no harm; it is the circulation solely, the taking them out of the mail and the use to be made of them, that constitutes the evil. Then it is perfectly competent for the State authorities to apply the remedy. The instant that the prohibited paper is handed out, whether to a citizen or a sojourner, he is subject to the laws which compel him either to surrender or burn it."

The bill which had been introduced by Mr. Calhoun was lost by a vote of 19 to 25. He demanded its passage, not upon the ground that Congress had a right to prohibit the conveying of established mail matter, but upon the ground that Congress owed a duty to each State, not to permit the postal service to be used as an agent for the circulation in any particular State, of papers or documents, which by the laws of that State were contraband.

If Mr. Calhoun's contention were correct, then Congress could be called on to exclude from the mails any letter or newspaper, referring to any business or occupation whatever, which a State might condemn.

Mr. Clay's suggestion, it seems to me, was a complete answer to the contention of Mr. Calhoun.

It is true that any State may make the practices of the Louisiana Lottery Company, or even the possession of its ticket within its borders with intent to sell, a crime. But is that any reason why Congress should interpose to aid such State legislation? When the mail carries the prohibited ticket to a post-office within such State, can it be said tnat the United States is aiding and abetting a crime?

The same argument may be applied to any other business or institution which a particular State may choose to denounce. Can the government be said to aid or abet the transgression of a law of the State, when the government is the unconscious carrier (I say unconscious be-

cause the contents of a sealed letter can not be known) of a thing which is innocent, while it is being carried, and only becomes guilty after transmission has ceased, by delivery to the person who is prohibited from using it? At what point of time does the government become a participator in the violation of the State law? The crime consists in the possession of lottery tickets with intent to sell. Is the law of the State infringed by the carriage in the mail, and the delivery of the tickets in a sealed letter?

Mr. Clay says: "The instant that a prohibited paper is handed out, whether to a citizen or sojourner, he is subject to the laws which compel him either to *surrender or burn it*."

Has any State the constitutional right to demand of Congress the passage of a law to aid such State in the execution of its domestic policy? Congress can not adopt as its own a State law passed in the exercise of the police power, if it can not itself enact the law. *In re* Reharer, 140 U. S. 560. On the other hand, is not Congress bound to respect the domestic institutions of a State and to abstain from all interference with them, except in so far as such interference becomes necessary in the execution of a power delegated to Congress by the Constitution?

There is a great difference between abstention from interference and active aid. Congress has no power actively to aid a State in matters reserved by the Constitution to the States, matters which are included in the term domestic, to distinguish them from federal matters. There is in such case an entire want of power, because the domestic concerns of a State are exclusively confined to the governments of the States, and as to such concerns, if I may use the language of Chief Justice Waite, "the United States has no existence."

Abstention from interference with the domestic con-

cerns of a State is on the other hand enjoined on the United States by the constitution itself; and hence it is the duty of the Federal Government to obey the constitutional injunction.

It was not until June 8, 1872, that Congress claimed the right to declare what class of letters, with respect to the character of the communication contained in them, should be considered mail matter. But that Act witheld mail facilities from illegal or fraudulent lotteries. The Act was incorporated into the revised statutes, and became Sections 3894, 3929 and 4041 of that compilation. In 1876 Section 3894 was amended by striking out the word "illegal," but Sections 3829 and 4041 remained unchanged. The act of 1890, which we challenge, amended all three sections of the revised statutes, and absolutely closed the mails against all lottery matter whatever, ignoring the distinction between legal and illegal lotteries. The Act of 1890 is printed in full in Mr. Carter's brief, p. 2, 3, 4.

No one disputes the absolute power of Congress to regulate all *physical* matters connected with the mails. Hence all hygienic provisions concerning the transmission and delivery of the mails during an epidemic, are legitimate subjects of legislation, as much so as the rates of postage, the weight of packages, the manner in which newspapers shall be folded or marked, and the nature of the substances to be put into the mails, as well as the time, mode and frequency of carriage.

The difficulty arises only when we pass from matter to mind, or from the physical world to the domain of thought, the region of ideas. I am speaking in a general way, without intending to enter the field of inquiry suggested by the materialistic school, which maintains that the brain secretes thought as the liver does bile.

To what extent does Congress possess the power to control or to interfere with the expression of thought orally or in words printed or written?

The sedition law, whether constitutional or not, was designed to repress criminal libels against the government, or either house of Congress or the President. It had direct relation to federal institutions. Lotteries established by law in the States are domestic institutions, and any legislation of Congress, whether hostile or favorable to them, except for the purpose of taxation, is beyond the scope of the powers delegated to the Federal Government. At one time the internal revenue laws of the United States imposed a license tax on lottery vendors, and a tax of 5 per cent. on their sales. But whence is derived the authority of Congress to stigmatize the correspondence of a State institution, or of persons engaged in conducting a business authorized by a State? Whence is derived this censorial power? One of the punishments which followed the nota of the Roman censor, was the taking of the public horse from a knight; the congressional nota takes away from the lottery vendors of Louisiana, and from the State itself, the use of the public mails. The deprivation is similar in nature.

Can Congress make words actionable which were not so at common law? Can Congress regulate petitions to the government, so as to exclude their transmission to Washington through the mails, if matter contained in such petitions be not agreeable to the congressional palate? If the common law of libel affords no limit to the power of regulation, at what point would congressional regulation commence to abridge the right of petition?

The State of Virginia passed an act in the year 1810 to suppress duels, and in order to give the insulted party a lawful means of redress, the statute provided that "all words which from their usual construction and common

acceptation are considered as insults, and lead to violence and breach of the peace, shall hereafter be actionable, and no plea, demurrer or exception shall preclude the jury from passing thereon, who are hereby declared to be the sole judges of the damages sustained," etc. Brooks vs. Callaway, 12 Leigh 471. Could Congress exclude from the mails, letters containing "words which from their usual construction and common acceptation are considered as insults and lead to violence and breach of the peace?" Could Congress exclude from the mails newspapers in which such words are printed? If such words be libelous at common law, the right to use the mails for the purpose of transmitting them never existed; but if they be not libelous, the right to transmit them through the mails existed when the Constitution was adopted, and that right can not be infringed by legislation—at all events as long as the transmission of letters and newspapers through the mails is allowed by law.

Mr. Justice Mathews in Smith vs. Alabama, 124 U. S. 479, says that there is one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. For this reason resort must be had to the common law to ascertain what offences against the United States are triable by jury. Call vs. Wilson, 127 U. S. 555. And if it be true, as was said by Mr. Justice Miller in ex parte Bain, 121 U. S., p. 12, that to interpret and construe the Constitution, we must place ourselves in the condition of the men who framed that instrument, it is impossible to do so if the common law and its history be excluded from consideration.

If Congress may exclude from the mails letters and

newspapers, on account of the matter contained in them, where is the limit to the discretion of Congress, if the common law furnish no limit? It seems to be admitted that Congress may not exercise a purely arbitrary discretion. It is admitted that Congress can not discriminate in favor of some and against other legitimate avocations. What is a legitimate avocation? Is it not any avocation which was lawful when the Constitution was adopted, and which to-day is allowed by any State?

In the case of Leisy vs. Hardin, 135 U. S., p, 157, Chief Justice Fuller said: "If only one State has not enacted prohibition laws it may sell intoxicating liquors in other States."

It is true that after the decision in Leisy vs. Hardin, the Congress, exercising its acknowledged power to regulate commerce, consented to allow the prohibition laws of the States to operate on intoxicating liquors imported in original packages from another State.

But it is contended that Congress may so exercise its power to regulate the mails, as to suppress not only a legitimate avocation within the State of Louisiana, but to cripple a State institution established for revenue purposes.

The power so to do is based on the alleged incidental obligation of the United States not to aid in the commission of wrong. The trouble is, has Congress the power to say that an act in a State is wrong, when the State, in the exercise of its reserved power, says it is right? Is the determination of right and wrong in matters of State policy committed by the Constitution to Congress?

Chief Justice Fuller in Leisy vs. Hardin, p. 123, says it is not for courts to desregard legislative determination of public policy. If so, is not the legislative determination of Louisiana conclusive on the subject of lotteries, a subject over which Congress has no control. This court

so regarded it in the case of New Orleans vs. Houston, 119 U. S. 273.

It is said that the United States government is subject to the rule "Sic utere tuo ut alienum non lædas." If that be so, I conclude that the injury inflicted by the Act of 1890 on Louisiana and its inhabitants can not be justified. Does the rule invoked, allow injury to be done to the people of one State for the benefit of the people of another State?

But it is said the government must so use its powers as not to inflict injury upon the "well-being of society." What is meant by the "well-being of society?" and what society is referred to? In our complex system of government we have a natural society as well as State societies. The extent to which the care of the national society is committed to the Federal Government is defined in the Constitution. Each State separately has the care of the society established within its limits.

The State society and the National society are two distinct and separate societies; the "good or well-being" of one may not be "the good or well-being of the other." Each within its sphere absolutely determines what is good for it, and what will promote its well-being. Each has its own policy. The right of defining and punishing offences against society other than such as fall under the express jurisdiction of the Federal Government is reserved to the State.

Tucker's App. 309.

This brings us back to the ever recurring question of the extent of the power of Congress, to exclude from the mails, written or printed matter which conforms to the standard of morals established in a State, and which is not obnoxious to censure according to the common law. And that question is to be solved by ascertaining whether Congress has power to enact a code of morals for a State,

or to repress by hostile legislation a domestic institution of such State.

If any object be exclusively within the scope of the reserved powers of the States, federal legislation is void as to that object, because the Constitution has not delegated the control of it to the Federal Government. State legislation is ineffective as to objects within the exclusive control of Congress. In both cases the nullity is the result, not of conflict between two competing systems of government, capable of dealing with the object, but of the absence of power to deal with it at all.

No direct general power over lotteries established in the States is granted to Congress, and consequently they remain subject to State legislation. If the legislative power of Congress can reach them, it must be by the exercise of a power clearly incidental to some power which is expressly given. The government of the United States, in the exercise of its powers, may use means that may also be employed by a State in the exercise of its acknowledged powers. In Gibbons vs. Ogden, 9 Wheat. 204 Chief Justice Marshall says: "If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power, to regulate the purely internal commerce of a State, or to *act directly on its system of police*."

When the Federal Government uses as an incident to an express power, the same means which a State uses in the exercise of its reserved powers, both are *means* to carry into execution acknowledged powers. But *prohibition* is not a means used in the exercise of power—a means signifies something positive; an instrument for gaining an end. Although the Federal Government and the States may employ the same instruments or means to execute their conceded powers, neither can by prohibition pre-

vent the other from having recourse to any means it has the power to use. Congress can only act by positive legislation, on any subject. Gibbons vs. Ogden, 9 Wheat 169.

For instance the government of the United States has no power to prohibit the establishment of State banks, although Congress by the exercise of the taxing power might render the business of banking under State authority so unprofitable that no one would pursue it.

But could Congress exclude from the mails the correspondence of State banks between themselves or concerning the business conducted by them?

The power to incorporate banks or other corporations was reserved to the State. "As to the powers thus reserved," says Mr. Justice ~~Wilson~~ Nelson in Vezie Bank vs. Fenno, 8 Wall. 555, "the States are as supreme as before they entered into the Union and are entitled to the unrestrained exercise of them."

The power of the Federal Government to tax State bank currency was questioned, because such taxation abridged the powers and faculties of the State governments, which are essential to the efficient and independent management of their internal affairs. The exclusion of the correspondence of such corporations from the mails, would be an undisguised attempt to encroach upon the reserved rights of the States, which the Constitution itself protects.

It is admitted by the Attorney General that Congress "can not discriminate without reason in favor of some as against other classes of our people, or in favor of some as against other legitimate occupations."

It will be admitted that an act of Congress which denied the use of the mails to colored persons on account of their color, or to women on account of their sex, would be unconstitutional. It will also be admitted that Con-

gress could not exclude a citizen of the United States from the use of the mails on account of his avocation, if that avocation be lawful. There is, therefore, a limit to the power of Congress to regulate the mails; the power is not absolute—its exercise is subjected to some restriction. If mails are established at all, the citizens of the United States have the right to use them for legitimate intercourse, and in the pursuit of their lawful avocations. The question, then, is, where does the power reside to determine what is a lawful avocation? Avocation, or more properly, vocation, means business, calling, trade, occupation, profession. Is not an avocation or business lawful which any State allows or authorizes to be carried on within its limits? If a State stamps with legality any business conducted within its jurisdiction, has Congress the power to declare such business illegitimate? Clearly not. Has any other State of the Union the power to so declare? Clearly not. On the contrary, the courts of the States where the business is forbidden will enforce contracts made in the transaction of the business, within the State where it is allowed.

If the Federal Government deprives the citizens of a State of the use of the mails to transact the business conducted by them lawfully, within its limits, especially when such use is confined to the territory of the State, it discriminates against a class of persons engaged in a lawful avocation.

In the case here put, other States are not concerned; for the use of the mails is confined to the territory of the State where the business is conducted, and to the citizens of that State engaged in the business. Nor in such case does the government aid in the commission of wrong, for wrong can not be predicated of what a sovereign State, in the exercise of its reserved powers, says is right within its own territory. In such case, I say the United States

Government is compelled to become, at least within the territory of the State, the agent of the persons engaged in that legitimate business, if transportation in the mails of sealed letters or packets constitutes the government an agent.

This must be so, otherwise the sovereignty of the States is a myth. If the States be sovereign in any aspect whatever, that sovereignty is manifested in the control of their domestic affairs. The domestic legislation or internal policy of a State can not be questioned by the Federal Government, or by any other State. When the State of New Hampshire excluded Roman Catholics from the office of governor, and from holding seats in the legislative department of the State government, no voice was raised against it, although the United States were bound to guarantee to every State in the Union a Republican form of government. This moral "burning of heretics," not by an inquisition a century ago, but by a State of this Union, from 1784 to 1877, elicited no repressive legislation on the part of Congress. Congress had no power to deal with the subject. Hence no one ventured to invoke its interposition. It is evident, then, that the prohibition of lotteries, or the prohibition of the sale of lottery tickets, in all the States of the Union, except Louisiana, has no bearing on the question under discussion; for if the allowance or disallowance of lotteries be a matter of policy that each State may determine for itself, no State can question the conduct of its neighbor.

If the States separately can not interfere with the internal policy of Louisiana, they can not do so through their representatives in Congress. because no such power has been delegated by the Constitution to the Federal Government.

To support his views the Attorney General refers to the case of United States vs. Holliday, 3 Wall. 407, in which

the court sustained the validity of Congressional legislation which forbade the sale of intoxicating liquors to Indians outside of any reservation and within the limits of a State.

In that case, the Indian to whom the liquor was sold was a member of the Winnebago tribe, and was in charge of the United States Indian Agent for said tribe.

The court held that the legislation was authorized under the power to regulate commerce with the Indian tribes. The tribal relations of the Indian had not been dissolved, and hence he was a pupil of the government, and as such entitled to its protection. But if the tribal relations of the Indian had been legally dissolved, and the condition of pupilage had terminated, the decision would have been otherwise.

So Congress could authorize a contractor for supplying a military post with provisions, to make purchases within a State, and any law of the State to restrain the contractor from making such purchases, or which fined him for so doing, would be void.

Until the anti-lottery legislation of 1890 was enacted by Congress, I had supposed the Government had long ago abandoned what Mr. Madison calls "the ambitious hope of making laws for the human mind." Madison's Writings, Vol. 1, p. 214.

I had also supposed that what was said in regard to the freedom of the press by the American envoys to the French Minister of Foreign Affairs was accepted as true American doctrine. They said this invaluable liberty may be carried to excess. "Perhaps it is an evil inseparable from the good to which it is allied; perhaps it is a shoot which can not be stripped from the stalk without wounding vitally the plant from which it is torn."

I had also supposed that Judge Cooley in his work on constitutional limitations had correctly said that the liberty

of speech and of the press implied "not only liberty to publish, but complete immunity from *legal censure and punishment* for the publication, so long as it is not hurtful in its character, *when tested by such standards as the law affords.* For those *standards we must look to the common law rules which were in force when the constitutional guarantees were established and in reference to which they have been adopted.*" Cooley, 6th Ed., p. 518.

Is not exclusion from the mails, that is to say, the deprivation of the use of a public franchise, both censure and punishment? The law which excludes a newspaper because it contains a lottery advertisement undoubtedly censures the matter contained in the journal, and it punishes its editor on account of the matter so published, if the deprivation of a common right be punishment. Discrimination in the use of the mails against a newspaper because of opinions expressed in its columns on a moral question, smacks of proscription; and when the newspaper is published in a State which by its laws sanction the opinions expressed, such discrimination amounts to direct interference with the domestic policy of the State, on a moral question, which the State alone is competent to determine.

Respectfully submitted,

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CLERK

SUPREME COURT OF THE UNITED STATES.

NOS. 13 AND 14, ORIGINAL OCTOBER TERM 1890.

EX PARTE IN THE MATTER OF GEORGE W. DUPRE.

THOS. J. SEMMES,
Of Counsel for George W. Dupré.

L. GRAHAM & SON, 99, 101, 103 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

NOS. 13 AND 14, ORIGINAL OCTOBER TERM 1890.

EX PARTE IN THE MATTER OF GEORGE W. DUPRE.

The Louisiana State Lottery Company was created by an act of the General Assembly of Louisiana, entitled "An act to increase the revenues of the State and to authorize the incorporation and establishment of the Louisiana State Lottery Company and to repeal certain acts now in force." It is known as Act No, 25 of the Session of 1868.

In Section 2 of the act the articles of incorporation are set forth. Article 2 declares that "the objects and purposes of this corporation are, first, the protection of the State against the great losses heretofore incurred by sending money to other States and foreign countries, for the purchase of lottery tickets and devices, thereby impoverishing our own people.

"Second, to establish a solvent and reliable home institution for the sale of lottery, policy and combination tickets, devices, certificates, fractional parts thereof, at terms and prices in just proportion to the prizes to be drawn, and to insure perfect fairness and justice in the distribution of such prizes.

"Third, to provide money to raise a fund for educational and charitable purposes for the citizens of Louisiana."

The preamble to the first section of the act states, that many millions of dollars have been withdrawn from and lost to the State, by the sale of Havana, Kentucky, Madrid and other lottery tickets, etc.

The fifth article of incorporation provides for the annual payment by the company to the State of $40,000, to be deposited in equal quarterly instalments in the treasury to the credit of the educational fund.

By Section 4 the duration of the corporation is limited to twenty-five years from 1st of January, 1869.

Article 167 of the Constitution of Louisiana, adopted in 1879, deals with this corporation in the following words:

"The forty thousand dollars now provided by law to be paid by the Louisiana State Lottery Company according to the provisions of its charter, granted in the year 1868, shall belong to the Charity Hospital, of New Orleans, and the charter of said company is recognized as a contract binding on the State for the period therein specified, except its monopoly clause, which is hereby abrogated and all laws contrary to the provisions of this article are hereby declared null and void. Provided said company shall file a written renunciation of all its monopoly features, in the office of the Secretary of State within sixty days after the ratification of this Constitution. Of the additional sums raised by licenses on lotteries, the hospital at Shreveport shall receive $10,000 annually, and the remaining sum shall be divided each year among the several parishes in the State for the benefit of their schools."

In the case of New Orleans vs. Houston 119 U. S. 273, this court held that "the effect of Article 167 of the Constitution of Louisiana is to revive the charter of the Louisiana State Lottery Company, granted in the year 1868, notwithstanding its repeal by Act No. 44 of the year 1879, except as to the clause which confers upon it the exclusive privilege of establishing a lottery and dealing in lottery tickets, and to recognize the charter thus modified as a contract binding on the state for the period therein specified."

The court in this case further say, that no contract rights can be vested under this constitutional provision which a subsequent Constitution might not destroy without impairing the obligation of a contract within the sense of the Constitution of the United States for the reason assigned in the case of Stone vs. Mississippi. But an ordinary act of legislation can not have that effect, because the constitutional provision has withdrawn from the scope of the police power of the State, to be exercised by the General Assembly, the subject matter of the granting of lottery charters, so far as the Louisiana State Lottery

Company is concerned, and an act of the legislature contrary to this prohibition is upon familiar principles null and void."

The premium bond plan for the redemption of the bonds of the city of New Orleans involves a lottery element. This plan was established by Act No. 31 of 1876 and is thus described by Mr. Justice Field in the opinion of the court delivered in Louisiana vs. Pillsbury, 105 U. S. 299: "The ten thousand series were to be placed in a wheel, and in April and October of each year as many series were to be drawn as were to be redeemed according to a certain schedule adopted. The bonds comprising the series thus drawn were to be entered for payment three months thereafter, principal and interest, and were to be receivable for all taxes, licenses and other obligations of the city. At the expiration of the three months the bond numbers of the drawn series were to be placed in a wheel and 1176 prizes, amounting to $50,000, were to be drawn and distributed."

This plan is in successful operation to-day, and has been in operation ever since 1876. One of the inducements held out to the creditors of the city to take premium bonds, was the prizes of $50,000 to be distributed every three months amongst those whose bonds were drawn for redemption. The drawn bonds are to be paid in full, principal and interest, and in addition thereto, each drawn bond is entitled to the chance of drawing a part of the quarterly $50,000 prizes.

It is thus perceived that the Louisiana State Lottery Company is an institution of the State, organized for revenue purposes; it is recognized and fostered by the laws and constitution of the State; it is established by the sovereign people of the State, authorized to deal with the subject, free from all Federal interference. The power thus exercised by the sovereign people of Louisiana to establish a corporation does not fall within the domain of the powers conferred by the Constitution of the United States upon the Federal Government, and therefore the Federal Government has no constitutional capacity to entertain, and no constitutional authority to express, any opinion concerning it as a fit instrument to be used by a State to accomplish its purposes or to promote its interests.

Immoral tendencies can not be ascribed by the government of the United States to an institution created by the sovereign people of a State in their own interest, especially when the alleged immorality is not based upon the universal consensus of mankind, but upon the shifting opinions of men. Lotteries have existed from time immemorial. The promised land was divided by lot among the tribes of Israel. Lotteries were for some time drawn in the churchyard of St. Paul's Cathedral in London. General Washington was president of a lottery company. Thomas Jefferson wrote in defence of lotteries. James Madison approved and signed an act of Congress authorizing a system of lotteries for the purpose of improving the city of Washington. The Rev. Samuel Seabury, of Connecticut, the father of Bishop Samuel Seabury, the first Episcopal bishop of the United States, recorded in his diary the following statement: "The ticket No. 5866 in the Light House and Public Lottery, of New York, drew in my favor, by the blessing of Almighty God, £500 sterling, of which I received £425, there being a deduction of 15 per cent, for which I now record to my posterity my thanks and praise to Almighty God the giver of all good gifts."

The monarch from whom Louisiana derives her name, a few years before the settlement made by Bienville in New Orleans, promulgated a charter with a preamble not unlike that of the Louisiana Lottery Company.

Louis XIV declares in the year 1700:

"La majesté ayant remarqué l'inclination naturelle de ses sujets à mettre de l'argent aux loteries et désirant leur procurer un moyen agréable et commode de se faire un revenu sûr et considérable pour le reste de leur vie, et même d'enrichir leur famille en donnent au hazard *** a jugé propos d'établir à l'hotel de ville de Paris une loterie royale de dix millions."

From the year 1709 till the year 1824 a lottery bill was a regular portion in the programme of every session of Parliament of Great Britain, as a means of raising revenues for the kingdom. Lotteries were voted for in the Congress of 1776, and have served for the rearing of schools, academies, churches and

other edifices in nearly all of the States until a very recent period.

Can any court now say that lotteries are illegal? Sir William Scott in speaking of the slave trade said: "A Court in the administration of law can not attribute criminality to an act where the law imputes none. It must look to the legal standard of morality; and upon a question of this nature that standard must be found in the law of nations, as fixed and evidenced by general and ancient and admitted practice, by treaties, and by the general terms of the laws and ordinances, and the formal transactions of civilized states; and looking to these authorities, he found a difficulty in maintaining that the transaction was legally criminal." (The Louis, 2 Dodson, 238.) Chief Justice Marshall, in the case of the Antelope (10 Wheat. 121), affirms the views expressed by Lord Stowell. He says: "If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it, and for two centuries it was carried on without opposition or censure. A jurist could not say that a practice thus supported was illegal and that those engaged in it might be punished, either personally or by deprivation of property. * * * * Each nation may renounce it for its own people, but can this renunciation affect others? * * * A right, then, which is vested in all by the consent of all can be divested only by consent; and this trade in which all have participated must remain lawful to those who can not be induced to relinquish it." Hence this Court in Stone vs. Mississippi in speaking of lotteries says "they are not in the legal acceptation of the term *mala in se*, but as we have just seen may properly be made *mala prohibita*." 101 U. S. 121.

No one pretends that Congress, in the exercise of any express or implied or incidental power vested in it by the Constitution, can prohibit in the States the establishment of lotteries or declare them to be illegal. Each State has absolute control over the subject by virtue of the governmental or police powers reserved to the State or the people, by the tenth amendment of the Constitution. Whence then is derived the power of Congress to enact special statutes on the subject of lotteries "the

object of which," says Chief Justice Waite, "is to close the mails against them." Stone vs. Mississippi, 101 U. S. 819.

The direct power of Congress to legislate against lotteries in the States is not to be found in the Constitution; Congress can not make lotteries in the States illegal or declare them to be *mala prohibita*. The hostile legislation of Congress, it is said, is derived from the power to regulate the mails. It is claimed that this power is exclusive and absolute, and that the power to regulate includes the power to exclude from the mails whatever Congress may deem fit. It is said that the power to tax is the power to destroy, and for that reason the States have no power to tax the operation of any agency created by Congress. A right to tax, without limit or control, is substantially a power to destroy, because there is a limit beyond which no institution and no property could bear taxation.

For the same reason it has been held that the governmental agencies of a State can not be taxed by the United States. In Collector vs. Day, 11 Wall. 127, the court say: "And if the means and instrumentalities employed by the general government to carry into operation the powers granted to it, are necessarily and for the sake of self-preservation exempt from taxation, why are not those of the States, depending upon their reserved powers, for like reasons equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution, that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation, as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government can exist only at the mercy of that government." These views are affirmed in the opinion delivered in United States vs. Railroad Company, 17 Wall. 322, where it is held that "Congress can not tax the revenues of a State, or of a municipal corporation which exercises a portion of the State's governmental power."

The principle of these cases will lead to the conclusion that the power to regulate the mails can not be exercised by Congress, to suppress or cripple the operations of a corporation created by the State for the purpose of raising revenue. The legislation of Congress prohibits the State and its officers, from using the mails within the limits of the State, for the transmission of any communication whatever concerning the Louisiana Lottery Company. The State Treasurer can not through the mails demand from the Louisiana Lottery Company payment of the $40,000 stipulated in the charter to be paid annually; nor can the company transmit by mail from New Orleans to Baton Rouge, a letter containing a statement that a check for $40,000 is enclosed to pay the annual sum due to the State for its lottery license. All such letters are forbidden because they are letters "concerning a lottery," to use the languarge of Section 3894.

Similar language was used in the bill prohibiting the circulation through the mails of publications "touching the subject of slavery." introduced into the Senate of the United States in 1836. "Under this provision Mr. Webster contended that it was impossible to say what publications might not be prohibited from circulation. No matter what was the publication, whether for or against slavery, if it touched the subject in any shape or form, it would fall under the prohibition. Even the Constitution of the United States might be prohibited," etc. App. Cong. Globe, 1st Sess. 24th Congress, 1836, p. 426.

I might add that as the Constitution of the State of Louisiana contains Article 167 concerning a lottery, its circulation through the mails is prohibited by this Section 3894.

Mr. Webster also said that "the bill applies to publications touching slavery, but under this example, Congress might be called upon to pass laws to suppress the circulation of political, religious or any other description of publications which produced excitement in the States."

Mr. Madison, in his classification of the powers granted to the general government, speaks, first, of the powers to secure the country against foreign danger; secondly, of the powers for the regulation of commerce, and thirdly, of the important and ex-

tensive class of powers "for the maintenance of harmony and a proper intercourse among the States."

The post-office establishment was not intended as an attribute of the power of the government, but as a means by which that power should be exercised for the benefit of the citizens individually, by providing a channel of free and full communication between them, though residing in different sections of the country, and that their letters, papers and pamphlets should pass without any hindrance from State authority. The use of the mail is in the nature of a reserved right, with which no law ought to interfere. Before the Constitution was adopted, the States possessed the power to furnish mail facilities, at least within their own limits, and when this power was surrendered to the federal government, no one ever supposed that Congress could exclude the citizens of a State, from using the mails within the limits of the State, to hold intercourse with the State officials, in regard to an institution of the State and for the purpose of transacting business with that institution.

Does the power to establish post-offices and post-roads, which includes the power to regulate the mails, confer on the general government the power to exclude the circulation through the mails, of any newspaper or letter on account of its religious, moral or political character?

It is not possible for Congress to discriminate in reference to the character of letters, newspapers and pamphlets without passing judgment on the matter contained in the papers which it declares shall or shall not be transmitted by the mail. Whence comes the power to sit in judgment on the thoughts of men as expressed in print or in writing? The power to regulate the mails, which, it is contended, confers on Congress the right to exclude from transmission in the mail what it thinks fit, must, of necessity, be confined to the material, not the moral, matter to be conveyed. Was it ever intended that Congress should have the power to legislate on the subjects to be discussed in newspapers or letters, and on account of the thoughts expressed therein to allow or to disallow them to be conveyed in the mails? The power to establish post-offices and post-roads was a power granted to the government for the purpose of a free and full inter communication of thoughts and opinions between the

citizens of different parts of the country. Can it be constitutionally exercised in such manner as to defeat the very object for which it was conferred?

It is admitted that Congress may make regulations which will secure the public against the use of the mails for criminal or immoral purposes; but not for any purpose which Congress may choose to adjudge immoral or criminal. The briefs already filed present my view on this subject with great accuracy. Taking into consideration the division of powers between the States and the general government, the power to create new distinctions between right and wrong, and thus to declare criminal what was before regarded as innocent, is one of the reserved powers of the State. Congress in the exercise of its power may act as a moral person as to all matters, which by the common consent of man are *mala in se* or absolutely evil in themselves, but as to matters otherwise indifferent or innocent, the right to exercise moral control belongs to the legislative authority having power over the subject. Therefore as to all crimes *mala in se*, and as to matters which by the Constitution Congress has the express or implied power to declare to be criminal, the government may grant or withhold its mail facilities in order to promote the moral policy it may approve, but upon all other subjects, the right to exercise such control is reserved to the States. Therefore libels, under which head are classed obscene books and pictures, and all matter promoting such crimes as murder, arson, burglary, larceny or other *mala in se* may be excluded from the mails by proper laws enacted for that purpose.

Any act which the common law at the time of the adoption of the Constitution did not stamp as immoral, unless it be an act having reference to subjects under Federal control, Congress can not declare to be immoral, and use its powers to punish it, especially in a State where the alleged immoral act is not only not indifferent, but is declared to be moral and proper.

This is the doctrine announced in United States vs. Fox, 95 U. S. 672, where Mr. Justice Field says: "An act committed within a State, whether for a good or bad purpose or whether with an honest or criminal intent, can not be made an offence

against the United States, unless it has some relation to the execution of a power of Congress or to some matter within the jurisdiction of the United States."

This court has declared to be unconstitutional a statute passed by Congress, which was designed to punish conspiracy to deprive a citizen of the rights and privileges secured to him by the Constitution and laws of the United States, because the statute also embraced a provision punishing conspiracy to deprive persons of the equal protection of the laws of the State. The court held that Congress had no power to punish persons engaged in conspiracies within a State to deprive a person of the equal protection of the State laws, and therefore that the whole statute was void. United States vs. Harris, 106 U. S. 629; Baldwin vs. Frank, 120 U. S. 684.

The same principle was applied in the Trade Mark case, 100 U. S. 98.

It can not be denied that Congress by the legislation contained in Section 3894 intended by means of exclusion from the mails of all written or printed matter "concerning a lottery" to disfavor and to suppress lotteries so far as it could, and to punish those engaged in the lottery business by depriving them of the use of the mails in the transaction of such business.

The purchase and sale of lottery tickets issued by the Louisiana State Lottery Company is a legitimate business in Louisiana; it is sanctioned by the laws and the Constitution of that State. Not only every citizen of Louisiana is entitled to engage in the business, but every citizen of the United States—indeed every alien who may visit the State or sojourn therein is lawfully entitled to conduct the business. If the object and purpose of a statute is to be determined by its natural and reasonable effect, as was held in Minnesota vs. Barber, 136 U. S. 314, then it must be conceded, that Section 3894 is punitive in its character, in the sense that it withholds from persons engaged in that business, the privilege of using the mails to conduct their business operations—it deprives lottery ticket vendors of the privilege enjoyed by every other citizen, in carrying on the operations of his legitimate business.

In Butchers Union Co. vs. Crescent City Co. 111 U. S. 762,

Mr. Justice Bradley said: "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence which commences with the fundamental proposition that 'all men are created equal; and that they are endowed by their creator with certain inalienable rights, that among them are life, liberty and the pursuit of happiness. This right is a large ingredient in the civil liberty of the citizen."

The character of the business does not affect the question under discussion, if the business be legal in the State where it is conducted. Any one in Louisiana may engage in the business of buying and selling lottery tickets issued by the Louisiana Lottery Company, although that company alone is at present authorized to establish a lottery. The fact is, the great monopoly case in Coke's Reports, part 11, p. 86, arose out of a claim to a monopoly of making and selling playing cards. In that case the defendant pleaded that he was a haberdasher in London, and a free citizen of that city, and had a right to make and sell playing cards. The Court held the plea good. (Slaughter House case, 16 Wall., p. 103. Whether the business be that of selling playing cards, or that of buying and selling lottery tickets, if it be a common business authorized by law which any citizen of the State may engage in, can he be punished by act of Congress for thus exercising his right of pursuing his business?

The court in *ex parte* Garland, 4 Wall. 377, says that "an exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

Exclusion of citizens from privileges or rights enjoyed by other citizens, because of their avocation, is in like manner punishment. It is but the introduction of the Roman law of "Infamy." For instance, play actors "*qui in scenam prodeunt lucri causa*" were held as infamous, though Livy and Valerius Maximus tell us of a remarkable exception made with reference to the representation of the Atellan plays derived from the Osci; they remark as something quite special, that it did not, as

in the case of ordinary plays, cause the actors to be degraded from their tribe, or to be incapacitated for service in the army. Livy 7, 2 Valer. Max. 11, 4, Sec. 4, "*Nam neque tribu movetur, neque a militum slipendiis repellitur.*" St. Augustine in like manner says, in his day that play actors, after their entry into the profession were expelled from their tribe by the Censors. Augustinus De Civitate Dei, 11, 13.

If Congress has not the direct power to punish the citizens of Louisiana who may engage in the business of buying and selling lottery tickets, can it do so indirectly?

To prohibit a person from using the mails to convey, printed or written matter relating to his business, and to prohibit the circulation through the mails of newspapers containing lottery advertisements or other matter concerning the lottery business in Louisiana. is a restraint on free discussion as well as a restraint on the liberty of the press.

Although other channels of communication may be open, yet the parties who pursue the avocation of buying and selling lottery tickets in Louisiana, are deprived of that channel of intercourse which the Constitution contemplated the government would furnish to all the citizens of this republic, when the power was granted "to establish post-offices and post-roads." To limit and restrict this great public and constitutional channel of communication and circulation, on account of the character of the written or printed matter, is neccessarily a restraint upon freedom of discussion and the liberty of the press.

The truth is there is no other adequate channel of communication than the public mail, and, so far as newspapers are concerned, the plea filed by the editor of the *Daily States* expressly avers "that the publishers and proprietors thereof were then and there without the means to circulate and distribute the said newspaper to the subscribers thereof *otherwise than by and through the mail of the United States, and no other means than said mail then and there existed whereby they could convey and deliver said newspaper to said subscribers, including the said A. J. Bachemin.*"

In such case, can it be said that the liberty of the press is not

abridged, by the refusal to allow the proprietors of the *Daily States* to use the mail for the circulation of their newspaper.

But this matter has been so thoroughly and elaborately presented in other briefs I refrain from further discussion of it.

Respectfully submitted,

THOS. J. SEMMES,

Of Counsel for George W. Dupré.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1208.

JAMES E. BOYD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA EX REL. JOHN M. THAYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED JUNE 15, 1891.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Citation	1	1
Proof of service of citation	2	1
Writ of error	3	1
Return on writ of error	5	2
Order granting leave to file information, &c.	6	3
Information	7	3
Exhibit—Abstract of votes cast	18	9
Summons	19	9
Sheriff's return	19	10
Motion for injunction	21	10
Affidavit of John M. Thayer	22	11
Notice of motion for injunction	24	12
Affidavit of John M. Thayer	25	13
Proof of service of notice and affidavit	27	14
Motion to dismiss	29	14
Notice of motion to argue and submit	31	15
Order fixing time for hearing	32	15
Order taking motion to dismiss under advisement	32	16
Order overruling motion to dismiss	33	16
Answer	33	17
Exhibit—Transcript of the record of D. C. U. S. for Nebraska in the matter of the naturalization of James E. Boyd	43	22
Exhibit—Petition of James E. Boyd for citizenship	45	24
Demurrer to answer	49	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 18, 1891.

	Original.	Print.
Order fixing time for hearing of demurrer	51	26
Order taking demurrer under advisement	51	26
Opinion	52	26
Dissenting opinion	100	56
Judgment of ouster	130	75
Writ of ouster	130	75
Sheriff's return on writ of ouster	132	76
Sheriff's return on copy of judgment	133	77
Bond on writ of error	135	77
Assignment of errors	138	79
Clerk's certificate	141	80

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Nebraska *ex relatione* John M. Thayer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein James E. Boyd is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 15th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

DAVID J. BREWER,
Justice Sup. C't.

2 [Endorsed:] 4610. The State of Nebraska *ex relatione* John M. Thayer *v.* James E. Boyd. Citation. Supreme court of Nebraska. Filed May 26, 1891. D. A. Campbell, clerk.

On this — day of ——, in the year of our Lord one thousand eight hundred and ninety—, personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 18—.

Service of the within citation is hereby accepted this 20th day of May, 1891.

JNO. L. WEBSTER,
Attorney for Within-Named Defendant in Error.

3 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Nebraska *ex relatione* John M. Thayer, relator, and James E. Boyd, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the

United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or
4 of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondent, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

5 [Endorsed:] 4610. The State of Nebraska *ex relatione* John M. Thayer *v.* James E. Boyd. Writ of error. Supreme court of Nebraska. Filed May 20, 1891. D. A. Campbell, clerk.

SUPREME COURT OF NEBRASKA, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, the writ of error, citation with acknowledgment of service, assignment of errors, and copy of bond.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Lincoln, this 26th day of May, 1891.

[Seal Supreme Court of Nebraska.]

D. A. CAMPBELL, *Clerk.*

6 THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER *v.* JAMES E. BOYD. } *Quo Warranto.*

Pleas before the honorable the supreme court of the State of Nebraska at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the sixth day of January, A. D. 1891.

Present: Hon. Amasa Cobb, chief justice; Hon. Samuel Maxwell, Hon. T. L. Norval, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that before said court there was presented a certain information; whereupon the court made the following order on the 13th day of January, A. D. 1891:

THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER *v.* JAMES E. BOYD. } *Quo Warranto.* No. 4610. Order as to Procedure.

On application of the relator for permission to file an information herein and cause summons to issue thereon, it is considered by the court that a summons may issue, returnable, according to the statutes governing the issuance of summonses, in the district court, and that the information may be filed in this court in this case.

And on the same day, to wit, January 13, 1891, an information was filed in the office of the clerk of said court in words and figures following, to wit:

7 In the Supreme Court of the State of Nebraska. January Term, 1891.

THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER *vs.* JAMES E. BOYD. }

John M. Thayer, in his own behalf, prosecutes this action—George H. Hastings, the attorney general, having refused to prosecute the same—and gives the court to understand and be informed:

1. On the Tuesday next succeeding the first Monday of November of the year 1888 he, the said John M. Thayer, was and for more than two years next preceding that time had been a citizen of the United States and of this State, and then had and now has all the qualifications required by law to hold the office of Governor of the State of Nebraska.

2. At the general election of this State, at the date aforesaid, for the election of Governor and all State officers in accordance with

the provision of the constitution and laws of this State, he was duly elected Governor; that he duly qualified and entered upon the duties of said office on the first Thursday after the first Tuesday in January, 1889, and ever since then has exercised and now exercises the duties of said office.

3. That his said election and oath of office as Governor made it his duty to hold his office for the term of two years from the first
8 Thursday after the first Tuesday in the January next after his election and until his successor should be elected and qualified.

4. That there was held another general election of this State on the Tuesday next succeeding the first Monday of November in the year 1890 for the election of Governor and other officers, and the returns of said election for the officers of the executive department were, as required by the constitution, sealed up and transmitted by the returning officers to the secretary of state, directed to the speaker of the House of Representatives, who did, on the 8th day of January, 1891, immediately after the organization of the House and before proceeding to other business, open and publish the same in the presence of a majority of each house of the Legislature, who were for that purpose assembled in the hall of the House of Representatives.

5. That said returns, so sealed up, transmitted, opened, and published, showed that the whole number of votes cast at said general election for the several persons voted for for the office of Governor aggregated 214,090; that of said number of votes so cast for Governor James E. Boyd received 71,331, J. H. Powers received 70,187, L. D. Richards received 68,878, and there were scattering 3,694; and James E. Boyd, being the person having the highest number of votes for the office of Governor, was by said speaker declared duly elected Governor for the term of two years from the first Thursday after the first Tuesday of January, 1891, and until his successor should be elected and qualified; and relator exhibits herewith and makes a part hereof a duly certified and authenticated copy of said returns.

9 6. That thereupon the said James E. Boyd took the oath of office required to be taken by the executive officers before they enter upon their official duties, and has usurped and invaded the office of Governor of Nebraska and has unlawfully attempted and now unlawfully attempts to hold the said office and perform the duties of Governor of Nebraska, and will continue so to do unless ousted therefrom by the judgment of *the* this honorable court.

7. But the relator further gives the court to understand and be informed that the said James E. Boyd was not at the time of his said pretended election, on the said Tuesday next succeeding the first Monday of November, 1890, a citizen of the United States, and because he was not as aforesaid then a citizen of the United States he was not then eligible to the office of Governor of this State, and as yet no person eligible thereto has been elected and qualified to succeed your informant, and it is the bounden duty of the relator to hold and continue in the office of Governor until some person

eligible thereto shall be elected and qualified as his successor; that in truth and in fact the said James E. Boyd was born in Ireland, of alien parents, in about the year 1834; that he was brought to this country when about ten years of age by his father, whose name was and is Joseph Boyd, who settled in about the year 1844 at Zanesville, Muskingum county, in the State of Ohio, where he has ever since resided and now resides; that the said Joseph Boyd, father of the said James Boyd, has never since he came to this country and settled at Zanesville, Ohio, resided at any other place.

10 That on the fifth day of March, 1849, at, in, and during the February (1849) term of the common pleas court of said Muskingum county, in the State of Ohio, the said Joseph Boyd, a native of Ireland and father as aforesaid of the said James E. Boyd, and when the said James E. Boyd was about fifteen years of age, in open court declared it to be his *bona fide* intention to become a citizen of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, State or sover-ignty whatsoever, and particularly the Queen of Great Britain and Ireland; and the following is a true and full copy of the journal entry from the records of the said common pleas court of the said Muskingum county, Ohio, showing such declaration of intention, to wit:

THE STATE OF OHIO, }
Muskingum County, } *ss*:

In the Common Pleas Court. February Term, 1849. Journal, Volume "T," Page 187.

Certified Copy of Journal Entry.

MONDAY, *March 5th*, 1849. Page 187.

* * * * * * * *

This day came into open court William Riches, a native of England, and Joseph Boyd and Patrick Jordan, natives of Ireland, and on their oaths respectively declare it to be *bona fide* their

11 intention to become citizens of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, State, or sover-ignty whatever, and particularly the Queen of Great Britain and Ireland.

* * * * * * * *

(Signed) R. STILLWELL,
Presiding Judge.

And your informant has and exhibits to the court a duly certified transcript of the said record entry as found on page 187 of said journal, vol. "T."

8. And relator further gives the court to understand and be informed that the said Joseph Boyd, father aforesaid of said James E. Boyd, never while the said James E. Boyd was under the age of twenty-one years applied to be admitted to become a citizen of the United States, and was never naturalized and never did become a citizen of the United States while the said James E. Boyd was under the age of twenty-one years; that at, in, and during the October (1890) term of the said common pleas court, held within and for the county of Muskingum, in the State of Ohio, and never before and not until after the said James E. Boyd was upwards of twenty-one years of age, and not until he was of the age of fifty-six years, the said Joseph Boyd, father of the said James E. Boyd, a native of Ireland, and up to that time and then a subject of the Queen of Great Britain and Ireland, appeared in open court and made application to be admitted to become a citizen of the United States and proved to the satisfaction of the court that he declared his intention to become a citizen of the United States on the fifth
12 day of March, 1849, before the court of common pleas of Muskingum county, Ohio, and also produced his certificate of such declaration of intention, and that he had resided within the limits of the United States five years then last past and for one year at least then last past within the State of Ohio, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and thereupon the said Joseph Boyd made solemn oath that he would support the Constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly to Great Britain and Ireland and the Queen of England, whose subject he then was; and, the court being then satisfied that the said Joseph Boyd had complied with the laws of the United States relating to the naturalization of aliens, it was ordered that he be, and he then was, admitted to become a citizen of the United States, and a certificate was then issued to him; and before that time he had never been and was not a citizen of the United States; and the following is a copy of the journal entry from the records of the common pleas court of said Muskingum county, Ohio, showing such application of the said Joseph Boyd to be admitted to become a citizen and his admission to citizenship of the United States, to wit:

THE STATE OF OHIO, }
Muskingum County. }

In the Common Pleas Court. October Term, 1890. Journal, Volume 42, Page 145.

Certified Copy of Journal Entry.

13 Naturalization.

* * * * * * *

This day Joseph Boyd and Joseph Feller, aliens, and natives of Ireland and England respectively, appeared in open court and made application to be admitted to become citizens of the United States, and prove to the satisfaction of the court that they declared their intention to become citizens of the United States 5th day of March, 1849, before the court of common pleas of Muskingum county, and on the 19th day of September, 1888, before the probate court of said county, respectively, and also produced their certificate of such declarations of intention; and said applicants further proved to the satisfaction of the court that they had resided within the United States five years last past, and for one year at least last past within the State of Ohio, and that during that time they had behaved as men of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; and thereupon the said Joseph Boyd and Joseph Feller made solemn oath that they would support the Constitution of the United States, and that they do absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly to Great Britain and Ireland and the Queen of England, respectively, whose subjects they were. And the court being satisfied that said Joseph Boyd and Joseph Feller, respectively, have complied with the laws of the United States relating to the naturalization of aliens, it is ordered that they be, and hereby are, admitted to become citizens of the United States, and that certificates thereof be issued to them.

* * * * * * *

GEORGE L. PHILLIPS, *Judge.*

STATE OF OHIO, }
Muskingum County, } *ss:*

14 I, Vincent Cockins, clerk of the common pleas court within and for said county, and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the journal and proceedings of the common pleas court within and for said county, and that said foregoing copy has been compared by me with the original entry on said Journal 42, page 145, and that the same is a correct transcript thereof.

In testimony whereof I do hereby subscribe my name officially and affix the seal of said court, at the court-house in Zanesville, in said county, this 29th day of December, A. D. 1890.
[SEAL.]
(Signed) VINCENT COCKINS, *Clerk.*

And the relator has and exhibits to the court a duly certified transcript of the said record entry as found on page 145 of said journal, volume 42.

9. And the relator further shows that careful and diligent search has been made by the clerk of the court of common pleas of said Muskingum county, Ohio, through all the records of his said office, and that the only record or journal entry in any shape or form in said court and in the records thereof of or concerning the declaration of intention to become and application of the said Joseph Boyd to be admitted a citizen of the United States in said office is found upon page 187 of Journal "T" and upon page 145 of Journal 42, and the only record or journal entries in said office of the naturalization of said Joseph Boyd is found upon said page 145 of said Journal No. 42, and that said two entries constitute the only and entire record of the naturalization of said Joseph Boyd as shown by
15 the records and journals of said court; and the relator exhibits and shows to the court the certificate of the clerk of said court, duly signed and made under oath, showing such facts.

10. And the relator further shows that the said James E. Boyd has never at any time declared his intention to become a citizen of the United States nor has he ever made application to be admitted as a citizen of the United States, but he has ever remained an alien and a subject to the Queen of Great Britain and Ireland.

And relator says by reason of the premises and by reason of the legal disqualification of the said James E. Boyd to hold said office of Governor the said election for Governor was and is null and void.

11. And the relator further shows that notwithstanding the fact that the said James E. Boyd was and is ineligible to the office of Governor as aforesaid, and notwithstanding the fact the relator is bound to continue in and hold the office of Governor and is entitled to the peaceable and undisturbed possession of the office of Governor and the furniture and records thereof, yet the said James E. Boyd has usurped and invaded the office of Governor of Nebraska unlawfully and has unlawfully undertaken to perform the duties of said office; and the relator has refused and refuses for the reason hereinbefore stated to surrender said office to said defendant and will not do so unless required so to do by the judgment of this honorable court, upon due hearing had.

Wherefore the said John M. Thayer prays judgment that the defendant, James E. Boyd, be declared not entitled to said office, and that he be ousted therefrom, and that he, the said John M. Thayer, be declared entitled to such office until such time as some
16 person eligible thereto shall be elected and qualified as his successor, and that the said James E. Boyd be enjoined from invading the said office and from interfering in any manner with the furniture, records, or anything therein or pertaining thereto, or

in any manner interfering or intermeddling with the relator in the performance of the duties of Governor of Nebraska.

JOHN L. WEBSTER,
JOSEPH H. BLAIR,
O. P. MASON,
Attorneys for the Relator.

STATE OF NEBRASKA, } ss:
Lancaster County, }

John M. Thayer, being first duly sworn, on oath says he has read the foregoing information and knows the contents thereof, and the facts therein stated are true.

JOHN M. THAYER.

Subscribed in my presence and sworn to before me this 9th day of January, A. D. 1891.

D. A. CAMPBELL,
Clerk Supreme Court.

17 (Endorsed:) 4610. In the supreme court, State of Nebraska. January term, 1891. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Information. *Quo warranto.* This information was presented to me and I refuse to prosecute the same. Geo. H. Hastings, att'y general. John L. Webster, Joseph H. Blair, O. P. Mason, attorney-for the relator. Supreme court of Nebraska. Filed Jan. 13, 1891. D. A. Campbell, clerk.

(See table marked p. 18.)

19 And thereupon, to wit, January 13th, 1891, there issued out of said court a certain summons in words and figures following, to wit:

Summons.

STATE OF NEBRASKA, ss:

In the Supreme Court.

The State of Nebraska to the sheriff of Lancaster county, Greeting:

You are hereby commanded to summon James E. Boyd to appear before the supreme court of the State of Nebraska, at the capitol, in Lincoln, the seat of government in said State, on Monday, the 16th day of February, A. D. 1891, then and there to answer unto the State of Nebraska and to an information upon the warrant of John M. Thayer, filed in his own behalf, in the nature of a *quo warranto*, by what warrant he, the said James E. Boyd, claims to hold, use, enjoy, and exercise the office of Governor of the said State of Nebraska, and to stand to and abide by the order, judgment, or decree of the said supreme court in the premises upon what shall then

and there be made to appear. Hereof fail not, and have you then and there this writ.

You will make due return of this summons on or before the 26th day of January, A. D. 1891.

Witness the Honorable Amasa Cobb, chief justice of our said court, at Lincoln, this 13th day of January, A. D. 1891.

D. A. CAMPBELL, *Clerk.*

[Endorsed:] No. 4610. In the supreme court, State of Nebraska. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Summons in *quo warranto.*

And afterwards, to wit, on January 17th, 1891, said summons was returned and filed endorsed as follows:

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

I hereby certify that on the 13th day of January, 1891, I
20 served the within writ on the within-named James E. Boyd by delivering to him in person a true and certified copy of this writ, with all indorsements thereon, as required by law.

SAM. McCLAY, *Sheriff,*
By C. W. HOXIE, *Deputy.*

Fees:

Service & ret	50
Copy	25
Mileage	10
	85

[Endorsed:] Supreme court of Nebraska. Returned and filed Jan. 17, 1891. D. A. Campbell, clerk.

And afterwards, to wit, on the 21st day of January, there was filed in the office of the clerk of said court a certain motion for injunction and affidavit in words and figures following, to wit:

21 In the Supreme Court, State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER *vs.* JAMES E. BOYD. } Motion.

And now comes the relator, John M. Thayer, and moves the court for an injunction herein to restrain and enjoin the defendant, James E. Boyd, from exercising or undertaking to exercise the office or duties of Governor of the State of Nebraska, and from invading, using, or occupying the rooms or any of them of the Governor of Nebraska heretofore and until the 15th of January, 1891, occupied

and used by the relator as Governor of Nebraska, and which the said defendant, James E. Boyd, on said 15th of January, 1891, unlawfully and with force invaded and took from the relator; and from using or removing from said rooms any of the furniture or records thereof; and from in any manner hindering or disturbing the relator in the quiet occupancy, use, and enjoyment of said rooms, office, records, and furniture, pending this suit and until the final hearing and judgment herein or the further order of the court.

JOHN L. WEBSTER,
JOSEPH H. BLAIR,
O P. MASON,
Attorneys for Relator.

January 15th, 1891.

(Endorsed as follows:)

No. 4610. In the supreme court, State of Nebraska. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Motion for an injunction pending suit. Supreme court of Nebraska. Filed Jan. 21st, 1891. D. A. Campbell, clerk. John L. Webster, Joseph H. Blair, O. P. Mason, attorneys for relator.

22 In the Supreme Court, State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER
vs.
JAMES E. BOYD. } Affidavit.

John M. Thayer, the relator above named, being first duly sworn, on oath says he now reaffirms all the matters, facts, and things set out in his information hereinbefore filed; and, further, on oath says that on the 15th day of January, 1891, in the forenoon of that day, the above-named James E. Boyd wrongfully and unlawfully invaded, with force and numbers, the rooms then occupied and in possession of relator as the lawful Governor of Nebraska and demanded of relator that he surrender and deliver said rooms, the records and furniture thereof to him, the said James E. Boyd; and it being then apparent that the said James E. Boyd, with the force and numbers he then had with him, would take said rooms, records, and furniniture with force and violence unless relator then delivered possession thereof as demanded or retired therefrom without physical resistance, the relator protested against the demand and invasion of said rooms by said defendant, but quietly and without physical resistance abandoned or went out of said rooms to await and abide such order of the court as might be made herein.

JOHN M. THAYER.

Subscribed in my presence and sworn to before me this 15th day of January, 1891.

D. A. CAMPBELL,
Clerk Supreme Court.

[SEAL.]

(Endorsed as follows:)
No. 4610. In the supreme court, State of Nebraska. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Affidavit. Supreme court of Nebraska. Filed Jan. 21, 1891. D. A. Campbell, clerk. John L. Webster, Joseph H. Blair, O. P. Mason, attorneys for relator.

23 And afterwards, to wit, on the 24th day of January, 1891, there was filed in the office of the clerk of said court a certain notice and affidavit in words and figures following, to wit:

24 In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER
vs.
JAMES E. BOYD. } Notice.

To James E. Boyd, the defendant above named:

You are hereby notified that the relator, John M. Thayer, will move the court, on the 29th day of January, 1891, at the capitol, in the court-room of said court, at 9 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an injunction to restrain and enjoin you from exercising or undertaking to exercise the office or duties of Governor of the State of Nebraska, and from invading, using, or occupying the rooms or any of them of the Governor of Nebraska heretofore and until the 15th day of January, 1891, occupied and used by the relator as Governor of Nebraska, and which you, on said 15th day of January, unlawfully and with force invaded and took from the relator, and further to restrain you from using or removing from said rooms any of the furniture or records thereof and from in any manner hindering or disturbing the relator in the quiet occupancy, use, and enjoyment of said rooms, office records, and furniture pending this suit and until the final hearing and judgment herein or further order of the court; and you are further notified that the affidavits hereto attached and accompanying this notice will be read and used at said hearing, and at that time and place you may be heard to show cause, if any you have, why such injunction should not be granted.

JOHN L. WEBSTER,
JOSEPH H. BLAIR,
O. P. MASON,
Attorneys for Relator.

Dated this 17th day of January, 1891.

25 In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER
vs.
JAMES E. BOYD.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

John M. Thayer, the relator above named, being first duly sworn, on oath says that he now and at all times reaffirms all the matters, facts, and things set out in his information hereinbefore filed; and further on oath says that on the 15th day of January, 1891, in the forenoon of that day, above-named James E. Boyd wrongfully and unlawfully invaded in force and numbers the rooms then occupied and in the possession of the relator as the lawful Governor of Nebraska, and demanded of the relator that he surrender and deliver the said rooms, the records and furniture thereof to him, the said James E. Boyd; and it being then apparent that the said James E. Boyd, with the force and arms he then had with him, would take said rooms and the records and furniture with force and violence unless the relator then delivered possession thereof as demanded or retire therefrom without physical resistance, the relator protested against the demand and invasion of said rooms of the said defendant, but quietly and without physical resistance abandoned or went out of said rooms to await and abide such order of the court as might be made herein.

And the affiant further says that heretofore, to wit, on the 13th, 14th, and 15th days of January, 1891, one —— Crawford and Victor Vifquain, acting for and on behalf and under the direction of the said James E. Boyd, made threats and threatened with violence and *for and* force to remove the relator from said rooms previous to the 15th day of January, 1891, occupied by him as the Governor of the State of Nebraska, and appeared at the door of said rooms with a large crowd of persons and in a violent and threatening manner threatened to remove the relator from the possession of said rooms with force and violence, and would have carried said threats into execution had said affiant, on the 15th day of January, 1891,
26 refused to leave said rooms or resisted the said Boyd in his demand for said rooms; and further affiant sayeth not.

JOHN M. THAYER.

Sworn to before me and subscribed in my presence this 17th day of January, 1891.

J. G. WADSWORTH,
Notary Public.

[SEAL.]

27 THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that on the 19th day of January, 1891, I served the within writ on the within-named James E. Boyd by delivering to him in person a true and certified copy of this writ with all endorsements thereon.

By C. W. HOXIE, *Deputy.*

SAM. McCLAY, *Sheriff,*
By C. W. HOXIE, *Deputy.*

Fees:

Service	50	cents.
Copy	25	"
Mileage	40	"
	1	15

(Endorsed as follows:)

4610. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Notice & affidavit. Supreme court of Nebraska. Filed January 24th, 1891. D. A. Campbell, clerk.

28 And afterwards, to wit, on the 16th day of February, 1891, there was filed in the office of the clerk of said supreme court a certain motion to dismiss in words and figures following, to wit:

29 In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER
vs.
JAMES E. BOYD. } Motion.

And now comes the said James E. Boyd, respondent, and moves the court to strike this cause from the files and calendar of this court, and to dismiss the same on the grounds—

First. That said relator, John M. Thayer, has no right, title, or authority in law to institute or maintain this action.

Second. That the petition and relation herein does not state facts sufficient to constitute a cause of action.

Third. That said petition and relation show on its face that James E. Boyd, respondent, is the duly elected, qualified, and acting *de jure* Governor of this State and entitled in law to hold said office and bound to discharge the duties thereof for and during the term of two years from and after the 8th day of January, A. D. 1891.

JAMES E. BOYD,
By JOHN D. HOWE,
His Attorney.

JOHN C. COWIN, *Of Counsel.*

(Endorsed as follows:)

4610. In supreme court. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Motion. Supreme court of Nebr. Filed Feb'y 16th, 1891. D. A. Campbell, clerk. John D. Howe, John C. Cowin, for respondent.

30 And afterwards, to wit, on the 2nd day of March, 1891, there was filed in the office of the clerk of said court a certain notice to respondent to argue and submit motion to dismiss in words and figures following, to wit:

31 In the Supreme Court, State of Nebraska.

STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER
vs.
JAMES E. BOYD. } Notice.

To attorneys for defendant:

You are hereby notified that the attorneys of the relator will make application to the supreme court of the State of Nebraska on the morning of Tuesday, March 3rd, 1891, at the opening of court, or as soon thereafter as counsel can be heard, to argue and submit the above-entitled cause upon the pleadings now on file therein.

JOHN L. WEBSTER,
J. H. BLAIR,
O. P. MASON,
Attorneys for Relator.

STATE OF NEBRASKA, } *ss:*
Lancaster County, }

I hereby certify that on the 24th day of February, 1891, I served the within notice on the within-named James E. Boyd by delivering to him a true copy of the same. After diligent search I have been unable to find any of the attorneys for the defendant in my bailiwick.

Fee, 50 cents.

SAM. McCLAY, *Sheriff.*

(Endorsed on back as follows:)

No. 4610. In the supreme court, State of Nebraska. State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Notice. Supreme court of Nebraska. Filed Mar. 2nd, 1891. D. A. Campbell, clerk. John L. Webster, O. P. Mason, and Joseph H. Blair, attorneys for relator.

32 And afterwards, to wit, on the 3rd day of March, 1891, the following order was rendered by said court and entered of record, to wit:

THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER
v.
JAMES E. BOYD.

Quo Warranto. No. 4610. Order Fixing Time for Hearing.

On motion of relator for an order fixing the time for hearing the respondent's motion to dismiss the proceeding herein, and the respondent, by John D. Howe, his attorney, consenting thereto, it is ordered by the court that said hearing be, and it hereby is, fixed for Wednesday morning, March 4, 1891, and the oral argument will be limited to one hour and thirty minutes on each side.

And afterwards, to wit, on the 4th day of March, 1891, the following order of submission was rendered by said court and entered of record, to wit:

THE STATE OF NEBRASKA *ex Relations* JOHN M. THAYER
v.
JAMES E. BOYD.

Quo Warranto. No. 4610.

This cause came on to be heard upon the motion to dismiss the proceeding herein, was taken up, and argued by counsel and by the court taken under advisement.

And afterwards, to wit, on the 5th day of March, 1891, the following order overruling motion to dismiss was rendered by said court and entered of record, to wit:

33 THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER
v.
JAMES E. BOYD.

Quo Warranto. No. 4610. Order Overruling Motion to Dismiss.

This cause having been submitted to the court on March 4, 1891, upon the motion of respondent to dismiss the proceeding herein, and the court being fully advised in the premises, it is considered that said motion or demurrer be, and the same hereby is, overruled, and the respondent is required to answer by the coming in of the court on Tuesday morning, March 10, 1891.

And afterwards, to wit, on the 10th day of March, 1891, there was filed in the office of the clerk of said court a certain answer in words and figures following, to wit:

In the Supreme Court of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER
v.
JAMES E. BOYD, Respondent. } Answer.

Now comes the respondent, James E. Boyd, and admits that the attorney general of this State refuses to prosecute this action, and protests and insists and avers the fact to be that the information herein is insufficient in law to require the respondent to make answer thereto, for that it does not show that said John M. Thayer has any right or title to the said office of Governor of Nebraska, or that he has any right, title, or authority to institute, maintain, or prosecute this action, and for that said information does not state facts sufficient to constitute a cause of action.

Further answering, respondent admits the allegations of the first, second, third, fourth, and fifth paragraphs of the information, except as hereinafter shown. Further answering, said respondent shows to the court that said John M. Thayer was, at the regular State election held in the State of Nebraska in November, A. D. 1888, elected to the office of Governor of this State for a term thereof commencing in January, 1889, and that upon the canvass of the votes cast at said election he was duly declared to be so elected; that the term of said office is fixed by the constitution to commence on the first Thursday after the first Tuesday in January succeeding the election and continues for a period of two years and until his successor shall be elected and qualified; and the respondent further says that the laws of Nebraska at all the times herein mentioned provided that if a qualified incumbent of the office holds over by reason of the non-election or non-appointment of his successor he shall qualify within ten (10) days from the time at which his successor, if elected, should have qualified by taking the oath of office, executing it, in having approved and filed for record his official bond in the sum of fifty thousand ($50,000.00) dollars, conditioned for the faithful performance of the duties of the office, as by law required.

34

Respondent further says that the said John M. Thayer continued as the actual incumbent of said office down to the time when this respondent qualified as Governor of this State, on the 8th day of January, 1891, which was the first Thursday after the first Tuesday in January succeeding the election in question. Respondent further says that the said John M. Thayer has never since the 8th day of January, 1891, qualified anew as Governor of the State of Nebraska; that he has not since that date taken or filed the official oath required by law, nor has he had his official bond executed or approved or filed for record, as by law required, to qualify him anew if no party was elected to hold said office of Governor from and after the said 8th day of January, as he alleges in his information, but which respondent denies; and in this behalf further alleges the fact to be that after the said 8th day of January, 1891, the respondent entered into the office of Governor of the State of Nebraska, and the said John M. Thayer from that time

35

and thereafter wholly surrendered, abandoned, and removed from said office, and has not since in any manner, directly or indirectly, occupied or possessed the same or assumed or pretended to assume to perform any of the functions thereof, but wholly surrendered same and vacated said office.

Answering the sixth paragraph of said information, the respondent admits that after his election to the said office and the canvass of the returns and after he had been declared elected to the said office by the speaker of the house of representatives in the presence of a majority of the Legislature, as required by law, he, on the 8th of January, 1891, took the oath of office, executed and filed his official bond, did all other acts and things required by law of him to be done to qualify and entitle him to enter into the possession, use, and *employment* of said office and to discharge the duties thereof, and the respondent denies that he has usurped or invaded the said office or unlawfully attempted at any time to hold said office and to perform the duties thereof, but avers the fact to be that at and from the commencement of the term of his said office, from January 8th, 1891, he has been and now is the duly elected and qualified Governor of the State of Nebraska, in the quiet, legal, and actual possession and enjoyment of said office and discharging its duties; that he has been recognized so to be by all of the departments and officers of the State government.

And the respondent further avers the fact to be that the said John M. Thayer ceased to be the incumbent of said office in law and in fact with the expiration of the 8th day of January, A. D. 1891, and prior to the commencement of this action.

Answering the eighth paragraph of said information, the respondent denies all the allegations thereof except that he was born in Ireland, of alien parents, in the year 1834; that he was
36 brought to this country, when about ten years of age, by his father, Joseph Boyd, who settled about the year 0844 in Belmont county, Ohio, where he resided for several years, and thereafter removed to Zanesville, Muskingum county, Ohio, where he has ever since resided.

Respondent also admits that his father, on or about March 5th, 1849, when respondent was about 14 years of age, declared his intention to become a citizen of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state, and sovereignty whatever, and particularly the Queen of Great Britain and Ireland, and that the alleged exemplification of the record thereof copied in said information respondent believes is a true copy.

Answering the 8th paragraph of said information, respondent says he admits the facts therein alleged, except as in this answer otherwise averred, but denies the conclusions of law and facts therein stated.

Respondent further avers that his father for forty-two years last past has enjoyed and exercised all of the rights, immunities, and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio and was in all respects and to all

intents and purposes a citizen of the United States and of the State of Ohio, at all times disclaiming and abjuring allegiance to every foreign prince, potentate, state, or sovereignty; that — all of said times said Joseph Boyd behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; that when the said Joseph Boyd settled in the State of Ohio as aforesaid it was his *bona fide* intention to make the United States his permanent residence; that at that time he did in fact disclaim and abjure all allegiance and fidelity to the Queen of Great Britain and Ireland and to every other foreign prince, potentate, state,
37 and sovereignty, and for about 40 years acted in the belief that he was a citizen of the United States, all said times exercising the elective franchise without question or challenge, voting for all officers of the State and Federal Governments the same as a native-born citizen of the United States and of the State of Ohio.

Respondent further says that about the year 1870 said Joseph Boyd was elected to the office of justice of the peace in said Muskingum county, Ohio, and thereupon took an oath to support the constitutions of the United States and of the State of Ohio, and for several years held said office, exercising all the rights, franchises, powers, and duties of said office, and has for years last past held office under the constitution and laws of Ohio, to wit, weighmaster in the city of Zanesville, which office he now holds.

Respondent further says that he was informed by his father as early as the year 1855 that he, the said Joseph Boyd, was a citizen of the United States and entitled, in law and in fact, to all the rights, privileges, and immunities of a citizen of the United States and of the State of Ohio, and that ever since said time this respondent has so believed and accepted the fact so to be, and never heard the fact challenged or questioned till after he was elected to the office of Governor of this State, in 1891. Respondent further says that he did, upon arriving at the age of 21 years, exercise the election franchise in said Muskingum county, Ohio, in the fall of 1855.

The respondent further alleges, on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws so as to admit and constitute him a full citizen of the United States thereunder, he having exercised the rights of citizenship herein described, and at said time informed re-
38 spondent that such was the fact; that when his father applied to be registered in Ohio in October, 1890, under a new law, he was required to produce his citizenship papers, and being unable to find all thereof, he appeared before said court of common pleas of Muskingum county, at the October term thereof, 1890, and the proceedings described in the 9th paragraph of the information were had as therein set out, but respondent avers the fact to be, on information and belief, that in the matter of said proceedings said Joseph Boyd acted unadvisedly and ignorantly, the said last-named proceedings being in that event unnecessary.

Respondent further says that in the year 1856, at the age of 22,

he left his father's home in Ohio in the firm belief that he, respondent, was a citizen of the United States in law and in fact, to establish himself in life; that he went to the State of Iowa, where he resided for a few months.

In the month of August, 1856, respondent removed to the Territory of Nebraska, which was then to a large extent a wilderness, and settled in Douglas county, where he resided for two years, working at his trade as a carpenter, and in 1857 he was elected county clerk of said county, and took an oath to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created. Respondent removed to what is now Buffalo county, near Old Fort Kearney, which was then upon the extreme frontier, in the fall of 1858, where he engaged in the business of farming, in the midst of great perils from hostile Indians, suffering years of extreme hardship. In 1864, at the time of the Indian outbreak in said vicinity, when the lives and property of settlers were destroyed or endangered, when many settlers were massacred, when hostile Indians killed cattle before the door of the home of his family, he volunteered his services as a soldier of the United States, which were accepted by the United States
39 Government, he being sworn into its military service by order of General R. B. Mitchell; that he served as a soldier of the United States, without compensation or reward, to protect the men, women, and children of the frontier and to maintain the authority, honor, and flag of the United States Government.

In the year 1866 respondent was elected a member of the house of representatives of Nebraska to represent the counties of Buffalo and Hall; that he served as such officer in the following session of the Legislature, to which was submitted the proposition of the Congress of the United States to accept the first constitution of this State with the conditions imposed by the act of Congress known as the enabling act, below named; that before entering upon the duties of said office he took the oath required by law and swore to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created.

In 1868 respondent removed to Douglas county, where he has since resided. In the year 1871 respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a State constitution, and, after taking the oath required by law to support the constitutions of the United States and State of Nebraska, in fact served as a member of said convention.

In the year 1875 the respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a constitution, which convention discharged that duty in the year 1875, which resulted in forming the constitution under which the government of this State has since existed. Respondent, after taking the oath required by law to support the constitutions of the United States and of this State, in fact served as a member of said convention.

In 1880 respondent was elected and acted as president of the city council of the city of Omaha.

40 In 1881 respondent was elected mayor of the city of Omaha, and served in said office for two years. In 1885 respondent was again elected to said office of mayor, and served for two years, and before taking the office of mayor each of said times respondent took an oath to support the constitution of the United States and of the State of Nebraska.

Respondent further says that during said period of over 30 years he has exercised the elective franchise in said Territory and State of Nebraska and enjoyed all the rights, privileges, and immunities of a citizen of the United States and of said Territory and State.

Respondent further says that for over 32 years last past he has been in fact and in law a citizen of the United States and of said Territory and State; that neither the United States nor the Territory or State of Nebraska has ever challenged his citizenship or sought to oust him of the franchise actually enjoyed and exercised by him to be a citizen of the United States, and that it is not competent for this relator so to do; that if his said right and privilege of being a citizen of the United States is subject to challenge, it is solely for the United States in its sovereign capacity to challenge the same.

And he further avers that he was at the time of the election in question and for more than two years prior thereto eligible to be elected to and to hold said office of Governor for the term in question.

Respondent further says that in 1849 it was his *bona fide* intention to be a citizen of the United States, and that he then renounced and abjured forever all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly the Queen of Great Britain and Ireland; that during all the time since he has behaved as a man of good moral character, attached to the

41 principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and all said time has absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly the Queen of Great Britain and Ireland.

Further answering, respondent shows to the court that after his said election as Governor and after he had learned for the first time that his citizenship had been questioned, and on December 16th, 1890, he went before the district court of the United States for the district of Nebraska for the purpose of removing all doubts that might arise thereafter in respect thereof, and by petition to said court represented to that court the facts necessary to be known in that behalf touching his said history and citizenship of the United States, insisting therein that he was and had been for more than two years next preceding his election to the office of Governor in November, 1890, a citizen of the United States, and also representing to said court that a question had been raised as to his citizenship; whereupon said court, by its judgment, found, determined, and adjudged that he was in fact and law a full citizen of the United

States; and respondent avers that he is and for many years last past has been a citizen of the United States within the meaning and requirements of the acts of Congress of the United States, a copy of which petition, judgment, and record is hereto attached and made part of this answer.

Respondent denies the allegations of the 9th, 10th, and 11th paragraphs of said information, except that he refuses to surrender said office of Governor to the said relator, and all other allegations of said information not hereinbefore admitted or specially answered.

Wherefore respondent prays to be hence dismissed with his costs in this behalf most wrongfully expended, and for such other and further relief as may be just and proper.

42

JAMES E. BOYD,
By JOHN C. COWIN AND
JOHN D. HOWE,
Attorneys for Respondent.

STATE OF NEBRASKA, }
County of Lancaster, } *ss:*

James E. Boyd, being first duly sworn, deposes and says that he is the respondent above named, and that the facts set forth in the foregoing answer are true, as he believes.

JAMES E. BOYD.

Subscribed in my presence and sworn to before me March 10th, 1891.

CHARLES S. LOBINEGIER,
Notary Public. [SEAL.]

(Endorsed:) 4659. Supreme court, State of Nebraska. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd, respondent. Answer. Supreme court of Nebraska. Filed Mar. 10, 1891. D. A. Campbell, clerk.

43 (*Exhibits to Answer.*)

UNITED STATES OF AMERICA:

UNITED STATES DISTRICT COURT, }
District of Nebraska, } *ss:*

At the November term of the district court of the United States for the district of Nebraska, begun and held in the city of Omaha, in said district, on the 16th day of December, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable Elmer S. Dundy, judge.

In the Matter of the Naturalization of JAMES E. BOYD, an Alien.

On this day James E. Boyd, an alien born, above the age of twenty-one years, appeared in open court and made application to

be admitted to become a naturalized citizen of the United States of America, pursuent to the several acts of Congress heretofore passed on that subject; and the said James E. Boyd having thereupon produced to the court record testimony showing that he had heretofore reported himself and filed his declaration of his intention to become a citizen of the United States, according to the provisions of said several acts of Congress, and the court being satisfied, as well from the oath of the said James E. Boyd as from the testimony of Ellis L. Bierbower and Charles Ogden, who are known to be citizens of the United States, that the said James E. Boyd has resided within the limits and under the jurisdiction of the United States for at least five years last past, and at least one year last past within the State of Nebraska, and that during the whole of that time he has behaved himself as a man of good moral character, attached to the principles contained in the Constitution of the United States, and wekk disposed to the good order, well being, and happiness of the
44 same, and having come to America under the age of fifteen years he was allowed to declare his intention to become and became a citizen of the United States at the same time.

It was ordered that the said James E. Boyd be permitted to take the oath to support the Constitution of the United States and the usual oath whereby he renounced all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and more particularly to the Queen of the Kingdom of Great Britain and Ireland, whereof he was heretofore a subject, which said oath having been administered to him by the clerk of said court it was ordered by the court that the said James E. Boyd be admitted to all and singular the rights, privileges, and immunities of a naturalized citizen of the United States, and that the same be certified by the clerk of this court, under the seal of said court, accordingly.

Read, approved, and signed in open court this 16th day of December, 1890.

(Signed) ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I, E. S. Dundy, Jr., clerk of the district court of the United States for said district, do hereby certify the foregoing to be a true and correct transcript from the records of said court in the matter of the naturalizztion of James E. Boyd.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at my office, in Omaha, this 16th
[SEAL.] day of December, A. D. 1890, and of the Independence of the United States the 115th year.

By order of the court:

(Signed) E. S. DUNDY, JR., *Clerk.*

(Endorsed:) The State of Nebraska *ex relatione* John M.
45 Thayer *v.* James E. Boyd. Transcript from records United. States district court, district of Nebraska. In the matter of the naturalizztion of James E. Boyd. Supreme court of Nebraska. Filed Mar. 10, 1891. D. A. Campbell, clerk.

UNITED STATES OF AMERICA, }
District of Nebraska. }

In the District Court of the United States for the District of Nebraska.

To the Hon. Elmer S. Dundy, judge of said court:

The undersigned, a resident of the State of Nebraska, represents to the court that he was born in the county of Tyrone, Ireland, on the 9th day of September, 1834, and remained a subject of the Queen of Great Britain until he removed to the United States, in said year, with his father and located in the State of Ohio, where he lived until 1856; that his father declared his intentions to become a citizen of the United States, to wit, on or about the 5th day of March, 1849, and that he supposed and believed his father had become a citizen of the United States, and that he always understood and believed that he was a citizen of the United States by reason of his father becoming such, and was so informed by his father then — at divers subsequent times; that in the year 1856 he left the State of Ohio and went to the State of Iowa, and from there came to the State of Nebraska, arriving in Nebraska on the 19th day of July, 1856, and has been a continuous resident of said State ever since; that he has held several offices of profit and trust and continued to exercise the rights of citizenship in other respects at various times since he has so resided in said last-named State; that he has on several and various occasions sworn to support the Constitution of the
46 United States and the constitution of the State of Nebraska, and has done so to the best of his ability; that his citizenship has been questioned and some doubts have been raised in connection therewith. Now, for the purpose of settling said question and removing said doubts, he most respectfully asks permission to file his declaration of intention to become a citizen and to be permitted to furnish the necessary proof to show that he is entitled to be admitted to such citizenship.

JAMES E. BOYD.

STATE OF NEBRASKA, }
County of Douglas, } ss:

James E. Boyd, being first duly sworn, deposes and says that he is the petitioner who is named and described in the above-entitled petition, and that the facts contained in the foregoing — are true.

Signed in my presence and sworn to before me this 16th day of December, 1890.

E. S. DUNDY, JR., *Clerk.*

UNITED STATES OF AMERICA, }
District of Nebraska, } ss:

I, E. S. Dundy, Jr., clerk of the district court of the United States for the district of Nebraska, certify that the foregoing is a true copy of the petition filed by Hon. James E. Boyd at the time of his application for citizenship papers; and I further certify that said petition

was filed in said court on the 16th day of Dec., 1890, and that the same is now on file in my office.

Witness my hand — seal of the said court, at Omaha, this 15th day of January, 1891.

E. S. DUNDY, JR., *Clerk.* [SEAL.]

(Endorsed:) 4610. The State of Nebraska *ex relatione* John M. Thayer *vs.* James E. Boyd. Copy of petition filed by James
47 E. Boyd in U. S. dist. court, dist. of Nebraska, at time of application for citizenship. Supreme court of Nebraska. Filed Mar. 10, 1891. D. A. Campbell, clerk.

48 And on the same day, to wit, March 10, 1891, there was filed in the office of the clerk of said court a certain demurrer to answer in words and figures following, to wit:

49 In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER *vs.* JAMES E. BOYD. } Demurrer to Answer.

Comes now the State of Nebraska upon relation of John M. Thayer and demurs to the answer of the defendant, James E. Boyd, and for grounds of demurrer state-:

1st. The said answer does not state facts sufficient to constitute a defense to the information herein.

2nd. The facts stated in said answer are insufficient to justify the defendant in holding and exercising the office of Governor of Nebraska.

3rd. The answer shows upon its face that the defendant, James E. Boyd, was an alien and ineligible to the office of Governor of Nebraska in November, 1890, at the time of his pretended election, and that he unlawfully invaded and usurped the office of Governor in January, 1891, before the filing of said information, and that he now holds the same unlawfully and without rights or authority of law, as charged in said information.

4th. The said answer admits upon its face the facts pleaded in the information showing the election of the relator, John M. Thayer, in November, 1888, and his right to hold said office, by reason of the ineligibility and the consequent non-election of defendant, for the term of two years from the first Thursday after the first Tuesday of January, 1891, and until a successor shall be elected and qualified.

5th. The exhibits filed by the defendant with his answer show him never to have been a citizen of the United States prior to December, 1890.

50 Wherefore the said relator prays judgment of the court upon the pleadings; that the said defendant be ousted from the

said office of Governor of Nebraska, and that the said relator be reinstated therein.

JOHN L. WEBSTER,
O. P. MASON,
JOSEPH H. BLAIR,
Attorneys for Relator.

(Endorsed as follows:)
4610. In the supreme court of Nebraska. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. Demurrer of relator to answer of the defendant. Supreme court of Nebr. Filed Mar. 10th, 1891. D. A. Campbell, clerk. John L. Webster, O. P. Mason, and Joseph H. Blair, attorneys for relator.

51 And afterwards, to wit, on the 10th day of March, 1891, the following order was rendered by said court and entered of record, to wit:

THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER *v.* JAMES E. BOYD. } *Quo Warranto.* No. 4610. Order Fixing Time for Hearing of Demurrer to Answer.

On application of relator it is ordered by the court that the hearing of the demurrer to respondent's answer be, and it hereby is, fixed for Thursday, March 12, A. D. 1891.

And afterwards, to wit, on the 12th day of March, 1891, the following order was made by said court and entered of record, to wit:

THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER *v.* JAMES E. BOYD. } *Quo Warranto.* No. 4610.

This cause came on to be heard, was taken up, and argued by counsel on the demurrer to the answer of respondent, and was by the court taken under advisement.

And afterwards, to wit, on the 5th day of May, 1891, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

52 *Opinion. Filed May 5th, 1891.*

STATE *ex Rel.* JOHN M. THAYER *v.* JAMES E. BOYD. } No. 4610.

The supreme court has jurisdiction to entertain proceedings by information in the nature of *quo warranto*, instituted for the purpose of determining the rights of persons claiming the office of Governor.

2. Under the provisions of section 2, article V, of the constitution, no person is eligible to the office of Governor who has not been a citizen of the United States and of this State for at least two years next preceding the election at which such officer is to be chosen.

3. Where a plurality of votes are cast for a person for a public office who is ineligible the election is void.

4. Under the 4th section of the act of Congress entitled "An act to establish an uniform rule of naturalization," approved April 14, 1802, the child of an alien, under twenty-one years of age, although born in a foreign country, becomes a citizen by the naturalization of his parents, if dwelling within the United States at the time the parent is admitted to citizenship; but it does not have that effect if he is over twenty-one years old at the time the parent is naturalized.

5. The order of a court admitting an alien to citizenship is a judicial act, in the nature of a judgment, and can be proved only by the record.

6. The fact that an alien has for many years voted at elections held in this State and filled important public offices does not establish that he is a citizen of the United States.

7. Where an alien is naturalized under the naturalization laws his citizenship dates from the time the order of the court is made admitting him to citizenship.

8. The alien inhabitants of the Territory of Nebraska at the time of its admission as a State did not become citizens of the United States by virtue of the acts of Congress admitting the State into the Union.

53 9. The words citizen of the United States, as used in section 2 of article V of the State constitution, — construed to mean a person who is an American citizen by birth or a person of foreign birth who has been duly naturalized under the provisions of the uniform rule of naturalization established by Congress.

10. Under section 1 of article V of the constitution a person elected to the office of Governor is entitled to discharge the duties and receive the emoluments of the office for the term of two years from the first Thursday after the first Tuesday in January following his election and until a successor is duly elected and qualified.

11. Where the person receiving the highest number of votes for the office of Governor is ineligible under the constitution to be elected, the Governor holds over.

12. The duties of the chief executive office of the State devolve upon the lieutenant governor in certain contingencies, among which are the failure of the Governor elect to qualify and disability of the Governor. It cannot be said that there has been a failure to qualify where no person has been constitutionally elected to the office.

13. The words "other disabilities of the Governor," appearing in section 16, article V, of the constitution, have no reference to the ineligibility of the person to be elected, but cover any disability of the Governor not specifically enumerated in the section occurring after the commencement of his term of office.

14. Held that when the non-election of a person to a public office is ascertained by proceedings in *quo warranto*, the person entitled to hold over must then requalify.

54 NORVAL, *J.:*

This is an action of *quo warranto* brought in this court by John M. Thayer in his own behalf, the attorney general having refused to prosecute the same, to establish the relator's right to the office of Governor of this State and to oust the respondent therefrom.

The information alleges:

"1. On the Tuesday next succeeding the first Monday of November of the year 1888 he, the said John M. Thayer, was and for more than two years next preceding that time had been a citizen of the United States and of this State, and then had and now has all the qualifications required by law to hold the office of Governor of the State of Nebraska.

2. At the general election of this State, at the date aforesaid, for the election of Governor and all State officers, in accordance with the provision of the constitution and laws of this State, he was duly elected Governor; that he duly qualified and entered upon the duties of said office on the first Thursday after the first Tuesday in January, 1889, and ever since then he has exercised and now exercises the duties of said office.

3. That his said election and oath of office as Governor made it his duty to hold his office for the term of two years from the first Thursday after the first Tuesday in the January next after his election and until his successor should be elected and qualified.

4. That there was held another general election of this State on the Tuesday next succeeding the first Monday of November, in the year 1890, for the election of Governor and other officers, and the returns of said election for the officers of the executive department were, as required by the constitution, sealed up and transmitted by the returning officers to the secretary of state, directed to the
55 speaker of the house of representatives, who did, on the 8th day of January, 1891, immediately after the organization of the house and before proceeding to other business, open and publish the same in the presence of a majority of each house of the Legislature, who were for that purpose assembled in the hall of the house of representatives.

5. That said returns, so sealed up, transmitted, opened, and published, showed that the whole number of votes cast at said general election for the several persons voted for for the office of Governor aggregated 214,090; that of said number of votes so cast for Governor James E. Boyd received 71,331; J. H. Powers received 70,187; L. D. Richards received 68,878, and there were scattering 3,694; and James E. Boyd, being the person having the highest number of votes for the office of Governor, was by said speaker declared duly elected Governor for the term of two years from the first Thursday after the first Tuesday of January, 1891, and until his successor should be elected and qualified, and relator exhibits herewith and makes a part hereof a duly certified and authenticated copy of said returns.

6. That thereupon the said James E. Boyd took the oath of office required to be taken by executive officers before they enter upon their official duties, and has usurped and invaded the office of Governor of Nebraska, and has unlawfully attempted and now unlawfully attempts to hold said office and perform the duties of Governor of Nebraska, and will continue so to do unless ousted by the judgment of this honorable court.

7. But the relator further gives the court to understand and be informed that the said James E. Boyd was not at the time of his said pretended election, on the said Tuesday next succeeding the first Monday of November, 1890, a citizen of the United States, and because he was not, as aforesaid, then a citizen of the United States he was not then eligible to the office of Governor of this State, and as yet no person eligible thereto has been elected and qualified to succeed your informant, and it is the bounden duty of the relator to hold and continue in the office of Governor until some person eligible thereto shall be elected and qualified as his successor; that in truth and in fact the said James E. Boyd was born in Ireland, of alien parents, in about the year 1834; that he was brought to this country, when about ten years of age, by his father, whose name was and is Joseph Boyd, who settled, in about the year 1844, at Zanesville, Muskingum county, in the State of Ohio, where he has ever since resided and now resides; that the said Joseph Boyd, father of the said James E. Boyd, has never since he came to this country and settled at Zanesville, Ohio, resided at any other place.

56

That on the fifth day of March, 1849, at and during the February (1849) term of the common pleas court of said Muskingum county, in the State of Ohio, the said Joseph Boyd, a native of Ireland, and father as aforesaid of the said James E. Boyd—and when the said James E. Boyd was about fifteen years of age—in open court declared it to be his *bona fide* intention to become a citizen of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatsoever, and particularly the Queen of Great Britain and Ireland.

(Here follows a copy of the journal entry from the records of said common pleas court showing such declaration of intention.)

8. And relator further gives the court to understand and be informed that the said Joseph Boyd, father of aforesaid James E. Boyd, never while the said James E. Boyd was under the age of twenty-one years applied to be admitted to become a citizen of the United States, and was never naturalized and never did become a citizen of the United States while the said James E. Boyd was under the age of twenty-one years; that at, in, and during the October (1890) term of the common pleas court held within and for the county of Muskingum, State of Ohio, and never before, and not until after the said James E. Boyd was upwards of twenty-one years of age, and not until he was of the age of fifty-six years, the said Joseph Boyd, father of the said James E. Boyd, a native of Ireland, and up to that time and then a subject of the Queen of Great

57

Britain and Ireland, appeared in open court and made application to be admitted to become a citizen of the United States, and proved to the satisfaction of the court that he declared his intention to become a citizen of the United States on the fifth day of March, 1849, before the court of common pleas of Muskingum county, Ohio, and also produced his certificate of such declaration of intention, and that he had resided within the limits of the United States five years then last past and for one year at least then last past within the State of Ohio, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; and thereupon the said Joseph Boyd made solemn oath that he would support the Constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly to Great Britain and Ireland and the Queen of England, whose subject he then was. And the court being then satisfied that said Joseph Boyd had complied with the laws of the United States relating to the naturalization of aliens, it was ordered that he be, and he then was, admitted to become a citizen of the United States. A certificate thereof was then issued to him. And before that time he had never been and was not a citizen of the United States.

Here is set out a certified copy of the records of said common pleas court showing the application of Joseph Boyd to be admitted to become a citizen and his admission to citizenship.

58 9. And the relator further shows that careful and diligent search has been made by the clerk of the court of common pleas of said Muskingum county, Ohio, through all the records of his said office, and the only record or journal entry in any shape or form in said court and in the records thereof of or concerning the declarations of intention to become and application of the said Joseph Boyd to be admitted a citizen of the United States in said office is found upon page 187 of Journal 'T' and upon page 145 of Journal 42, and the only record or journal entries in said office of the naturalization of said Joseph Boyd is found upon said page 145 of said Journal No. 42, and that said two entries constitute the only and entire record of the naturalization of said Joseph Boyd as shown by the records and journals of said court; and the relator exhibits and shows to the court the certificate of the clerk of said court, duly signed and made under oath, showing such facts.

10. And the relator further shows that the said James E. Boyd has never at any time declared his intention to become a citizen of the United States nor has he ever made application to be admitted as a citizen of the United States, but has ever remained an alien and a subject of the Queen of Great Britain and Ireland; and relator says by reason of the premises and by reason of the legal disqualification of the said James E. Boyd to hold said office of Governor the said election for Governor was and is null and void.

11. And the relator further shows that notwithstanding the fact

that the said James E. Boyd was and is ineligible to the office of Governor as aforesaid, and notwithstanding the fact that the relator is bound to continue in and to hold the office of Governor and is entitled to the peaceable and undisturbed possession of the office of Governor and the furniture and records thereof, yet the said James E. Boyd has usurped and invaded the office of Governor of Nebraska unlawfully, and has unlawfully undertaken to perform the duties of said office, and the relator has refused and refuses
59 for the reasons hereinbefore stated to surrender said office to said defendant and will not do so unless required so to do by the judgment of this honorable court, upon due hearing had."

The relator prays for a judgment of ouster, and that he be declared entitled to said office until such time as some person eligible thereto shall be elected and qualified as his successor.

To the information the respondent filed a motion to dismiss the cause on the grounds:

1. That the relator has no right to institute or maintain the action.

2. That the petition does not state facts sufficient to constitute a cause of action.

3. That the petition shows that the respondent is the duly elected, qualified, and acting *de jure* Governor and is entitled to hold and discharge the duties of said office for the term of two years from the 8th day of January, 1891.

After argument at the bar the motion was overruled, and thereupon the respondent answered the relation as follows:

"Now comes the respondent, James E. Boyd, and admits that the attorney-general of this State refuses to prosecute this action, and protests and insists and avers the fact to be that the information herein is sufficient in law to require the respondent to make answer thereto, for that it does not show that said John M. Thayer has any right or title to the said office of Governor of Nebraska, or that he has any right, title, or authority to institute, maintain, or prosecute this action, and for that said information does not state facts sufficient to constitute a cause of action.

Further answering, respondent admits the allegations of the first, second, third, fourth, and fifth paragraphs of the information, except as hereinafter shown. Further answering, said respondent shows to the court that said John M. Thayer was, at the regular
60 State election held in the State of Nebraska in November, A. D. 1888, elected to the office of Governor of this State for a term thereof commencing in January, 1889, and that upon the canvass of the votes cast at said election he was duly declared to be so elected; that the term of said office is fixed by the constitution to commence on the first Thursday after the first Tuesday in January succeeding the election, and continues for a period of two years and until his successor shall be elected and qualified; and the respondent further says that the laws of Nebraska at all the times herein mentioned provided that if a qualified incumbent of the office holds over by reason of the non-election or non-appointment of a successor he shall qualify within ten (10) days from the time at which

his successor, if elected, should have qualified, by taking the oath of office, executing it in having approved and filed for record his official bond in the sum of fifty thousand ($50,000.00) dollars, conditioned for the faithful performance of the duties of the office, as by law required.

Respondent further says that the said John M. Thayer continued as the actual incumbent of said office down to the time when this respondent qualified as Governor of this State, on the 8th day of January, 1891, which was the first Thursday after the first Tuesday in January succeeding the election in question. Respondent further says that the said John M. Thayer has never since the 8th day of January, 1891, qualified anew as Governor of the State of Nebraska; that he has not since that date taken or filed the official oath required by law, nor has he had his official bond executed or approved or filed for record, as by law required to qualify him anew if no party was elected to hold said office of Governor from and after the said 8th day of January, as he alleges in his information, but which respondent denies, and in this behalf further alleges the fact to be

61 that after the said 8th day of January, 1891, the respondent entered into the office of Governor of the State of Nebraska, and the said John M. Thayer from that time and thereafter wholly surrendered, abandoned, and removed from said office and has not since in any manner, directly or indirectly, occupied or possessed the same or assumed or pretended to assume to perform any of the functions thereof, but wholly surrendered same and vacated said office.

Answering the sixth paragraph of said information, the respondent admits that after his election to the said office and the canvass of the returns and after he had been declared elected to the said office by the speaker of the house of representatives in the presence of a majority of the Legislature, as required by law, he, on the 8th of January, 1891, took the oath of office, executed and filed his official bond, did all other acts and things required by law of him to be done to qualify and entitle him to enter into the possession, use, and employment of said office and to discharge the duties thereof; and the respondent denies that he has usurped or invaded the said office or unlawfully attempted at any time to hold said office and to perform the duties thereof, but avers the fact to be that at and from the commencement of the term of his said office, from January 8th, 1891, he has been and now is the duly elected and qualified Governor of the State of Nebraska, in the quiet, legal, and actual possession and enjoyment of said office and discharging its duties; that he has been recognized so to be by all of the departments and officers of the State government.

And the respondent further avers the fact to be that the said John M. Thayer ceased to be the incumbent of said office in law and in fact with the expiration of the 8th day of January, A. D. 1891, and prior to the commencement of this action.

Answering the eighth paragraph of said information, the respondent denies all the allegations thereof, except that he was born in Ireland, of alien parents, in the year 1834; that he was

62 brought to this country, when about ten years of age, by his father, Joseph Boyd, who settled, about the year 1844, in Belmont county, Ohio, where he resided for several years, and thereafter removed to Zanesville, Muskingum county, Ohio, where he has ever since resided.

Respondent also admits that his father, on or about March 5th, 1849, when respondent was about 14 years of age, declared his intention to become a citizen of the United States and to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state, and sovereignty whatever, and particularly the Queen of Great Britain and Ireland, and that the alleged exemplification of the record thereof copied in said information respondent believes is a true copy.

Answering the eighth paragraph of said information, respondent says he admits the facts therein alleged, except as in this answer otherwise averred, but denies the conclusions of law and facts therein stated.

Respondent further avers that his father for forty-two years last past has enjoyed and exercised all of the rights, immunities, and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio, and was in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio, at all times disclaiming and abjuring allegiance to every foreign prince, potentate, state, or sovereignty; that — all of said times Joseph Boyd behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; that when the said Joseph Boyd settled in the State of Ohio as aforesaid it was his *bona fide* intention to make the United States his permanent residence; that at that time he did in fact disclaim and abjure all allegiance and fidelity to the Queen of Great Britain and Ireland and to every other foreign prince, potentate, state, and sover-

63 eignty, and for about forty years acted in the belief that he was a citizen of the United States, — all said times exercising the elective franchise without question or challenge, voting for all officers of the State and Federal Governments the same as a native-born citizen of the United States and of the State of Ohio.

Respondent further says that about the year 1870 said Joseph Boyd was elected to the office of justice of the peace in said Muskingdom county, Ohio, and thereupon took an oath to support the constitutions of the United States and of the State of Ohio, and for several years held said office, exercising all the rights, franchises, powers, and duties of said office, and has for years last past held office under the constitution and laws of Ohio, to wit, weighmaster, in the city of Zanesville, which office he now holds.

Respondent further says that he was informed by his father as early as the year 1855 that he, the said Joseph Boyd, was a citizen of the United States and entitled, in law and in fact, to all the rights, privileges, and immunities of a citizen of the United States and of the State of Ohio, and that ever since said time this respondent has so believed and accepted the fact so to be, and never

heard the fact challenged or questioned till after he was elected to the office of Governor of this State, in 1890. Respondent further says that he did upon arriving at the age of 21 years exercise the election franchise in said Muskingum county, Ohio, in the fall of 1855.

The respondent further alleges, on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws, so as to admit and constitute him a full citizen of the United States thereunder, he having exercised the rights of citizenship herein described, and at said time informed re-
64 spondent that such was the fact; that when his father applied to be registered in Ohio, in October, 1890, under a new law, he was required to produce his citizenship papers, and, being unable to find all thereof, he appeared before said court of common pleas of Muskingum county, at the October term thereof, 1890, and the proceedings described in the 9th paragraph of the information were had as therein set out; but respondent avers the fact to be, on information and belief, that in the matter of said proceedings said Joseph Boyd acted unadvisedly and ignorantly, the said last-named proceedings being in that event unnecessary.

Respondent further says that in the year 1856, at the age of 22, he left his father's home in Ohio in the firm belief that he, respondent, was a citizen of the United States in law and in fact, to establish himself in life; that he went to the State of Iowa, where he resided for a few months.

In the month of August, 1856, respondent removed to the Territory of Nebraska, which was then to a large extent a wilderness, and settled in Douglas county, where he resided for two years, working at his trade as a carpenter, and in 1857 he was elected county clerk of said county, and took an oath to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created. Respondent removed to what is now Buffalo county, near Old Fort Kearney, which was then upon the extreme frontier, in the fall of 1858, where he engaged in the business of farming, in the midst of great perils from hostile Indians, suffering years of extreme hardship. In 1864, at the time of the Indian outbreak in said vicinity, when the lives and property of settlers were destroyed or endangered, when many settlers were massacred, when hostile Indians killed cattle before the door of the home of his family, he volunteered his services as a sol-
dier of the United States, which were accepted by the United
65 States Government, he being sworn into its military service by order of General R. B. Mitchell; that he served as a soldier of the United States, without compensation or reward, to protect the men, women, and children of the frontier and to maintain the authority, honor, and flag of the United States Government.

In the year 1866 respondent was elected a member of the house of representatives of Nebraska to represent the counties of Buffalo and Hall; that he served as such officer in the following session of the Legislature, to which was submitted the proposition of the Congress of

the United States to accept the first constitution of this State with the conditions imposed by the act of Congress known as the enabling act, below named; that before entering upon the duties of said office he took the oath required by law and swore to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created.

In 1868 respondent removed to Douglas county, where he has since resided. In the year 1871 respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a State constitution, and, after taking the oath required by law to support the constitutions of the United States and State of Nebraska, in fact served as a member of said convention.

In the year 1875 the respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a constitution, which convention discharged that duty in the year 1875, which resulted in forming the constitution under which the government of this State has since existed. Respondent, after taking the oath required by law to support the constitutions of the United States and of this State, in fact served as a member of said convention.

In 1880 respondent was elected and acted as president of the city council of the city of Omaha.

66 In 1881 respondent was elected mayor of the city of Omaha and served in said office for two years. In 1885 respondent was again elected to said office of mayor and served for two years, and before taking the office of mayor each of said times respondent took an oath to support the Constitution of the United States and of the State of Nebraska.

Respondent further says that during said period of over 30 years he has exercised the elective franchise in said Territory and State of Nebraska and enjoyed all the rights, privileges, and immunities of a citizen of the United States and of said Territory and State.

Respondent further says that for over 32 years last past he has been in fact and in law a citizen of the United States and of said Territory and State; that neither the United States nor the Territory or State of Nebraska has ever challenged his citizenship or sought to oust him of the franchise actually enjoyed and exercised by him to be a citizen of the United States, and that it is not competent for this relator so to do; that if his said right and privilege of being a citizen of the United States is subject to challenge it is solely for the United States in its sovereign capacity to challenge the same.

And he further avers that he was at the time of the election in question and for more than two years prior thereto eligible to be elected to and to hold said office of Governor for the term in question.

Respondent further says that in 1849 it was his *bona fide* intention to be a citizen of the United States, and that he then renounced and abjured forever all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly the Queen

of Great Britain and Ireland; that during all the time since he has behaved as a man of good moral character, attached to the
67 principals of the Constitution of the United States and well disposed to the good order and happiness of the same, and all said time has absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly the Queen of Great Britain and Ireland.

Further answering, respondent shows to the court that, after his said election as Governor and after he had learned for the first time that his citizenship had been questioned, and on December 16th, 1890, he went before the district court of the United States for the district of Nebraska for the purpose of removing all doubts that might arise thereafter in respect thereof, and by petition to said court represented to that court the facts necessary to be known in that behalf touching his said history and citizenship of the United States, insisting therein that he was and had been for more than two years next preceding his election to the office of Governor, in November, 1890, a citizen of the United States, and also representing to said court that a question had been raised as to his citizenship; whereupon said court, by its judgment, found, determined, and adjudged that he was in fact and law a full citizen of the United States, and respondent avers that he is and for many years last past has been a citizen of the United States within the meaning and requirements of the acts of Congress of the United States.

A copy of which petition, judgment, and record is hereto attached and made part of this answer.

Respondent denies the allegations of the 9th, 10th, and 11th paragraphs of said information, except that he refuses to surrender said office of Governor to the said relator, and all other allegations of said information not hereinbefore admitted or specially answered.

Wherefore respondent prays to be hence dismissed with his costs in this behalf most wrongfully expended, and for such other and further relief as may be just and proper."

68 The relator demurred to the answer on the ground that the facts stated therein are insufficient in law to constitute a defense. The case was submitted upon able arguments at the bar and exhaustive briefs.

We are met at the outset of our investigation with the proposition that this court has no jurisdiction to hear and determine the right of the respondent to hold the office of Governor.

Section 2 of article 6 of the constitution confers upon the supreme court original jurisdiction in mandamus, *quo warranto*, and *habeas corpus*.

Section 704 of the Code of Civil Procedure provides that "an information may be filed against any person unlawfully holding or exercising any public office or franchise within this State or any office in any corporation created by the laws of this State or when any public officer has done or suffered any act which works a forfeiture of his office," etc.

Section 710 provides that "when the defendant is holding an office to which another is claiming the right the information should

set forth the name of such claimant, and the trial must, if practicable, determine the rights of contesting parties."

Section 717 provides that "when an information is upon the relation of a private individual it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs in case they are not adjudged against the defendant," etc.

These, as well as other statutory provisions, not quoted, give a party who claims a public office the power to institute in the Supreme Court *quo warranto* proceedings in his own name to test the right of the incumbent to discharge the duties of such office. Authority is likewise conferred upon the Attorney General to bring such an action.

It is claimed that an information in the nature of a *quo warranto* will not lie against one holding the office of Governor. In
69 State *v.* Thayer, 47 N. W. Rep., 704, we held that mandamus will lie against the Governor to compel the performance of an official duty which is purely ministerial, and at the present term, in State *v.* Elder, 47 N. W. Rep., 710, it was decided that it was the duty of the speaker of the house of representatives, immediately upon the organization of the house, and before proceeding to other business, to open and publish the returns of the election for officers of the executive department, and that the duty thus enjoined upon the speaker by the constitution was a ministerial duty, which would be enforced by mandamus.

While it is true the executive and judicial departments of the State government are equal, co-ordinate, and independent branches of the State government and the officers of one department are prohibited by the constitution from exercising any powers or duties properly belonging to the other, yet it does not logically follow that the judiciary is powerless to hear and determine whether the person discharging the duties of the office of Governor is disqualified by the constitution from holding the office. This court, by entertaining a proceeding brought to test the right of the relator and the respondent to the office of Governor, does not exercise or assume to exercise any power belonging to the executive department. The sole object and purpose of this proceeding is to ascertain who, under the constitution and laws, is entitled to perform the duties of that office.

Mr. High, in his book on Extraordinary Legal Remedies, sec. 634, says: "The office of Governor of a State is regarded as a civil office of such a nature as to be amenable to the exercise of the jurisdiction under discussion; and where, by the constitution and laws of a State, its highest judicial tribunal is vested with jurisdiction by information in the nature of a *quo warranto* to prevent the citizens of the State from usurping its offices and franchises, an unlawful
70 intrusion into the chief executive office of the State may be tried by this proceeding to judgment of ouster. In such case a plain distinction is recognized between a department of the Government and the person assuming to exercise its duties, and the judicial branch of the Government in no manner interferes with or attempts to control the legitimate functions of the executive depart-

ment, but only seeks to protect the people from an unlawful usurpation of a high public office or franchise." The text of the learned author is fully sustained by the able opinions of the court in the case of the Attorney General *v.* Bartow, 4 Wis., 750.

But it is contended that the constitution having provided that contested elections for all officers of the executive department shall be determined by the Legislature, that remedy is exclusive of all others. The authorities cited in the brief of the respondent sustain the proposition, but the holdings of this and other courts are the other way—that the remedy by contest is not the sole remedy.

In Kane *v.* The People, 4 Neb., 509, was a proceeding by *quo warranto* brought in the district court of Cheyenne county by Henry Snyder to test the right of Thomas Kane to hold the office of county treasurer of that county. On error to this court objection was made that the court had no jurisdiction. In the opinion prepared by the then Chief Justice Lake it was held that the remedy by contest is merely cumulative, and that *quo warranto* is a concurrent remedy.

In State *v.* Stein, 13 Neb., 529, was a proceeding by *quo warranto* to try the right of the respondent, Robert P. Stein, to the office of county treasurer of Kearney county. It was ruled that the supreme court had jurisdiction.

To the same effect are Attorney General *v.* Barstow, 4 Wis., 750; State *v.* Messmore, 14 Wis., 115, and People *v.* Holden, 28 Cal., 123.

71 While the constitution declares that contests of the election of officers of the executive department are to be tried by the Legislature, the same instrument, as already stated, confers jurisdiction in *quo warranto* upon the supreme court.

It was not the intention of the framers of the constitution that the remedy by contest should impair the right of the judiciary to enquire into the authority by which any person assumes to exercise the duties of an office of the executive department and to remove him therefrom if he is constitutionally ineligible to be elected to or hold such office. We have no doubt that this court has jurisdiction of the case.

It appears from the pleadings that the respondent received a plurality of the votes cast for the office of Governor at the general election held in November, 1890. It is claimed by the relator that the defendant did not become a citizen of the United States until after such election, and therefore he was not eligible to nor legally elected to such office.

Section 2 of article 5 of the constitution reads: "No person shall be eligible to the office of Governor or Lieutenant Governor who shall not have attained the age of thirty years and been for two years next preceding his election a citizen of the United States and of this State. None of the officers of the executive department shall be eligible to any other State office during the period for which they shall have been elected."

The word "eligible" is defined in the Century Dictionary to be "qualified to be chosen; legally qualified for election or appointment." Substantially the same definition of the word is given in

Webster's Dictionary. In this sense the word "eligible" is used in the constitution.

The above constitutional provision was intended as a restriction upon the electors in choosing their Governor and Lieutenant Governor.

72 The people are prohibited from selecting any person to fill either of these offices who has not been a citizen of the State and of the United States for at least two years next preceding the election at which such officers are to be chosen or who is under the age of thirty years.

Section 97 of chapter 26 Comp. Stat. provides that "when the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void."

It is plain, whether we construe this section and the quoted provision of the constitution together or separate, that the effect of a person receiving a plurality of votes for the office of chief executive of the State who does not possess the constitutional qualifications to be chosen is to avoid the election and not to elect the person receiving the next highest number of votes for that office. State *v.* McMillen, 23 Neb., 385; *In re* Corliss, 11 R. I., 638; Dryden *v.* Swinburne, 20 W. Va., 134; State *v.* Sullivan, 47 N. W. Rep., 802; Saunders *v.* Haynes, 13 Cal., 154; Commonwealth *v.* Cluley, 56 Pa. St., 270; Com. *v.* Hanley, 9 *id.*, 513; State *v.* Jenkins, 43 Mo., 261; Gulick *v.* New, 14 Ind., 93; State *v.* Swearingen, 12 Ga., 23; State *v.* Smith, 14 Wis., 497; State *v.* Gastinel, 20 La. An., 114; People *v.* Clute, 50 N. Y., 451.

The question is so fully considered in these cases that further discussion is entirely unnecessary.

The record shows that the respondent, James E. Boyd, was born in Ireland, of alien parents, in the year 1834, and that he was brought to this country, when ten years of age, by his father, Joseph Boyd, who since the year 1844 has resided in the State of Ohio.

73 Joseph Boyd, on March 5, 1849, at Zanesville, Muskingum county, Ohio, before the common pleas court of that county, declared his intention to become a citizen of the United States, and in October, 1890, the said Joseph Boyd duly made application to the common pleas court of said Muskingum county to be admitted to become a citizen of the United States, and he was thereupon, by the order of said court, duly naturalized.

On the 16th day of December, 1890, the respondent, before the district court of the United States for this district, declared his intention to become a citizen of the United States, and at the same time made application to be admitted to become a naturalized citizen. By the order of said court he was, on said last-named date, admitted to citizenship.

Did the naturalization of Joseph Boyd in 1890 make the son a citizen?

Section 4 of the act of Congress entitled "An act to establish an

uniform rule of naturalization," etc., approved April 14, 1802, the same being section 2172 of the Revised Statutes of the United States, reads as follows:

"SEC. 4. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State or who has been legally convicted of having joined the army of Great Britain during the revolutionary war shall be
74 admitted to become a citizen without the consent of the Legislature of the State in which such person was proscribed."

Under the provisions of this section the minor children of an alien born out of the United States, if dwelling in the United States at the date of the naturalization of their parents, become *ipso facto* citizens by such naturalization, but it does not have the effect to make the children citizens if they are more than 21 years of age at the time the parent is admitted to citizenship. As the respondent was about 56 years old when his father was naturalized, it is obvious that such naturalization did not make the son a citizen. Dryden *v.* Swinburne, 20 West Va., 89; State *v.* Andriano, 92 Mo., 70; Gumm *v.* Hubbard, 97 Mo., 311; State *v.* Penny., 10 Ark., 621; O'Connor *v.* The State, 9 Fla., 215; U. S. *v.* Kellar, 13 Fed., 82; Campbell *v.* Gordon, 6 Cranch, 176.

We have found no case, and none has been cited by counsel, which holds that the naturalization of a parent makes his children who are at the time over the age of twenty-one years citizens.

The respondent in his answer alleges upon information and belief that prior to October, 1854, his father completed his naturalization in strict accordance with the laws of Congress on that subject. This allegation is insufficient to show that Joseph Boyd was a citizen of the United States. It is nowhere averred that any court admitted him to become a citizen prior to October, 1890. The name of the court should be averred, so as to show that the proceedings were before a tribunal having jurisdiction of the matter. The order of a court admitting an alien to citizenship is a judicial act in the nature of a judgment. Such proceedings are required to be made a matter of record. The record must be pleaded and proved the same as any other judicial record. Naturalization cannot be established by parol. *Ex parte* Knowles, 5 Cal., 300; Rump *v.* The Commonwealth, 30 Pa.
St., 475; *In re* Clark, 18 Barb., 444; Morgan *v.* Dudley, 18
75 B. Mon., 693; Green *v.* Sales, 31 Fed., 106; Dryden *v.* Swinburne, *supra;* State *v.* Penny., 10 Ark., 621; Spratt *v.* Spratt, 4 Peters, 1393; Bode *v.* Trimmer, 23 Pac. Rep., 187.

The fact that Joseph Boyd for more than forty years voted at elec-

tions and held public offices in the State of Ohio falls far short of raising a presumption that he was admitted to citizenship prior to October, 1890. It is clear that voting and holding office do not make an alien a citizen of the United States nor raise a presumption of such.

The fact that Joseph Boyd was admitted and declared a citizen in October, 1890, in the county where he had lived for forty years and in the same court in which he declared his intention to become a citizen on March 5, 1839, strengthens the conclusion that he was not naturalized until October last; nor does the fact that James E. Boyd has at each election in this State exercised the elective franchise and has frequently been elected to and held important public offices make him a citizen of the United States. This proposition is sustained by the following authorities: Dryden *v.* Swinburne, *supra;* Lanz *v.* Randall, 4 Dillon, 425; Maloy *v.* Duden, 25 Fed. Rep., 623.

It is evident that the numerous oaths taken by the respondent to support the Constitution of the United States and of this State did not make him a citizen of the United States. In order that an alien may be admitted to citizenship he must prove to the satisfaction of some court having jurisdiction of the matter the facts required by the act of Congress on that subject, and at the same time declare on oath before such court "that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject." U. S. Revised Statutes, sec. 2165.

76 Congress has established a uniform rule of naturalization, and an alien cannot be admitted to citizenship thereunder unless he follows the mode prescribed by the naturalization laws. The oaths taken by the respondent to uphold the Federal Constitution do not appear to have been administered by a court having jurisdiction, nor is it averred that he declared in any of the oaths that he absolutely renounced all allegiance to the Queen of Great Britain and Ireland, of whom he was a subject.

It is insisted that Joseph Boyd having declared his intention to become a citizen while James E. Boyd was a minor, the son took the status of the father, and the naturalization of the respondent in December, 1890, relates back to and makes him a citizen from the time his father made his declaration of intention. This position is untenable. The provision of the constitution elsewhere quoted makes a person ineligible to the office of Governor who is not a citizen of the United States for two years prior to the election. The respondent being disqualified to be elected when the votes were cast, his election was a nullity. His subsequent naturalization could not give validity to that which was void. Naturalization is not retroactive, and the doctrine of relation has no application to the case at bar. Dryden *v.* Swinburne, 20 W. Va., 134; Heney *v.* Brooklyn Benovolent Society, 39 N. Y., 333; Priest *v.* Cummings, 20 Wend., 342.

Judge Green, in his opinion in Dryden *v.* Swinburne, *supra*, says: "Another position taken is that the naturalization of Ralph Swinburne in 1866 related back to 1852, when he made his declaration, and he is therefore to be now considered as a citizen from that date. No authority is cited to sustain this novel position except a number of cases on entirely distinct subjects, in which, for reasons applicable to such cases, the law permits in certain cases a relation back. Thus an office found, when returned, relates back and rests title in the Commonwealth from the finding. So the appointment of
77 an administrator for certain purposes relates back to the death of the testator. A patent when issued relates back to the entry. A sale when confirmed by a court of equity relates back to the time of the sale. The astute counsel could have found, no doubt, many other cases where the law allows such relation back, sometimes for all purposes and at other times for certain purposes only. On the other hand, innumerable cases might be cited where there is no such relation back. Each case of this character is based on reasons applicable to it specially. But what possible bearing they or the reasons on which they are based have upon the present case I confess I am unable to perceive. The only matter referred to in this connection which has any reference to naturalization is not a judicial case, but the action of the Federal Government, many years since, in demanding the release of an Austrian, Martin Coster, who had declared his intention to become a citizen of the United States and who was afterwards unjustly imprisoned by the Austrian Government. This shows that a person who has declared his intention to become a citizen of the United States has certain rights which our Government will protect. Doubtless he has many rights which the courts will protect, but this certainly does not show that he has all the rights of a citizen. If it shows anything which has any relation to the matter before us, it shows too much. If Martin Coster had the rights of a citizen, he had them before he was naturalized, for when he was arrested he had not been naturalized."

In the New York case, Woodruff, J., in speaking for the court, says: "It is clear, I think, that we are to seek for the legal effect of naturalization in the statutes by which it is authorized and in such legislation as has been had in our own State on the subject. It is not to be determined upon a mere definition of the term 'naturalization.' But if it were, it would be most logical and more consistent with sound principles to say that the subject when natural-
78 ized began to have capacities pertaining to citizenship available for the future, and only in such future. If it were conceded that the Congress of the United States have power to declare the effect of naturalization so as to give to the subject thereof all the rights, retroactively as well as prospectively, which he would have or would have had if native born, of which in respect to real estate within the State, the transfer, transmission, and descent of which is peculiarly matter of State policy, there is great room for doubt. I think it is clear that the naturalization laws of the United States admit of no such construction.

Under those laws the applicant is admitted to citizenship upon

complying with certain prescribed conditions. He 'becomes' a citizen. He is put in a condition or acquires a character in which he can have and enjoy all the rights and privileges which by law pertain to citizenship, and that is all. But all this is, according to the plain reading of the laws, prospective. His capacity then begins to be useful or efficient to enable him to enjoy whatever pertains to his new character."

We therefore reach the conclusion that the naturalization of the respondent by the order of the United States court last December has no retroactive effect, and in reaching this conclusion we have not overlooked the authorities cited by counsel for respondent upon this branch of the case. They are not analogous to the case before us.

There is another good reason for holding that the naturalization of James E. Boyd does not relate back to the time his father took out his first papers. Such papers were of no avail to the son when he made application to be admitted to citizenship. James E. Boyd was compelled before he was naturalized to declare his intention to become a citizen. Under the acts of Congress James E. Boyd, being under the age of twenty-one years when he came to the United States, was authorized to do this at the same time he applied
79 for citizen papers. It was all one transaction, on the same day. The doctrine of relation could not therefore apply in this case.

It is urged that the respondent became a citizen of the United States by the admission of the Territory of Nebraska as a State into the Union. We will now examine the question thus presented. The enabling act, approved April 19, 1864, provides that whenever a constitution shall be formed by the people of the Territory of Nebraska, in compliance with the provisions of the act, "it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States, without any further action whatever on the part of Congress." Afterwards, on the 1st day of March, 1867, the President of the United States issued his proclamation, wherein he declared and proclaimed the fact "that the fundamental conditions imposed by Congress on the State of Nebraska to entitle that State to admission to the Union have been ratified and accepted and the admission of said State into the Union is now complete."

The question for consideration is whether the admission of Nebraska as a State into the Union on an equal footing with the original States, as provided by the enabling act and the proclamation of the President, made all the inhabitants therein *ipso facto* citizens of the United States. Similar language is found in the enabling acts by which various Territories were authorized to form State governments in order to be admitted into the Union as States. It will be observed that the enabling act of Nebraska contains no provision touching the rights, privileges, and immunities of the inhabitants upon the State coming into the Union. The inhabitants of the Territory at the time the State government was formed were

subject to the jurisdiction of the United States and were already citizens of the United States, excepting such as were aliens.
80 These inhabitants who were citizens of the United States were none the less citizens by reason of the fact that they were inhabitants of the Territory. Citizens of the United States do not lose their citizenship by changing their residence from a State to a Territory. Citizens of the United States residing in the District of Columbia and in the Territories are such citizens to the same extent that they would be if residing in one of the States. Prentis *v.* Brennan, 2 Blatch., 164; Picquit *v.* Swan, 5 Mason, 54.

It may be safely stated that about as large a proportion of the inhabitants of the Territory of Nebraska were citizens of the United States as of the inhabitants of any of the States of the Union. There was no occasion, therefore, for Congress to intend the admission of the State into the Union as an act of collective naturalization. There was no more urgency or necessity for such a collective act of naturalization in the Territory than there would be to pass from time to time acts for the collective naturalization of aliens residing within the States. If Congress had intended the admission of new States into the Union under the various enabling acts to operate as a naturalization of all aliens residing therein, it is reasonable to suppose that it would have been so provided in the acts themselves in unmistakable terms.

The Constitution of the United States has conferred upon Congress the power to pass naturalization laws, and Congress has passed many acts on that subject. If Congress intended to extend the right of naturalization of aliens by the enabling act, outside of and beyond the various acts of Congress upon that subject, it would have so provided in the enabling act in language so plain and explicit as not to require construction. Applying the accepted rules of statutory construction, it cannot be held that the enabling act was intended to relate to naturalization, either individually or collectively and in contravention of the naturalization acts of Congress,
81 without it being so specifically stated in the enabling act.

Collective naturalization is where the Government, by treaty or cession, acquires the whole or a part of the territory of another nation and takes to itself the inhabitants thereof. For illustration of this we refer to the treaty of Paris, by which we acquired Louisiana Territory; the treaty with Spain, by which we acquired Florida; the treaty of Guadalupe Hidalgo, by which we acquired New Mexico and California, and the resolution of Congress by which the Republic of Texas was annexed to the United States. The power to confer such collective naturalization was not expressly conferred upon Congress by the Constitution, but doubtless exists in the Government as a necessary part of the treaty-making power. It being granted that the power exists in Congress to acquire territory by purchase, treaty, or cession, then it follows that the terms of such purchase, treaty, or cession may provide for the naturalization *in solido* of such of the inhabitants of the acquired territory or country as may elect to adhere to the new Government. This as a matter of political necessity, the reasons for which are clear. These

inhabitants are presumably natives of the soil; they constitute the body of the people; there are no courts of the new Government established in such acquired territory to administer the uniform rule of naturalization established by Congress, nor will there likely be in the near future. Without this power, then, the whole body of the inhabitants of the acquired territory must of necessity remain for a long and indefinite period without allegiance to or the rights of citizenship in any country.

This principle cannot, however, be applied to Nebraska for the reason that the Territory of Nebraska as well as the inhabitants thereof were already within the jurisdiction of the United States and subject to the General Government. Federal and territorial courts had been established in the Territory, with ample
82 power to naturalize foreigners, and were in the daily exercise of such powers. But a small per cent. of the inhabitants were of foreign birth, and most of these had taken the initia-ry steps to become naturalized by judgment of the courts under the general laws of Congress.

This question is made more clear by reference to the language of the enabling act. It provides that the State shall be admitted into the Union on an equal footing with the original States. It was the State which was admitted into the Union. The land, personal property, and inhabitants were already within the jurisdiction of the Federal Government. The State, in its municipal and sovereign capacity, was a new creation. It was the State thus newly created in its sovereign capacity that was admitted into the Union. It may be said that the inhabitants make the State; nevertheless the State in its political organization is entirely different and distinct from the inhabitants who may happen to reside therein.

The words "equal footing with the original States" cannot fairly be construed to have any reference to the status of the inhabitants. The word "footing" is defined "firm position, established place, relative condition." We must look to the Constitution of the United States to find out what the "firm position," "established place," and "relative condition" of the various States are. The rights of the States thus referred to are defined in the Constitution, such as having representation in the respective houses of Congress and in the electoral college, and other relative rights more particularly described in article 4 of the Constitution of the United States. The position and relative rights of the States set forth and defined in the Constitution, which were possessed by the original States, by virtue of the adoption of the Constitution of the United States, were what were intended to be secured to Nebraska by the enabling act.

83 If that act is to be construed as fixing the status of the inhabitants, why have it relate to citizenship any more than to property rights or personal rights? If it was intended to fix the status of the inhabitants as was the status of the inhabitants of the original States, then we are led into interminable difficulties by reason of the fact that these rights were different in the various States. The personal rights of the inhabitants of the original States

with reference to the elective franchise are collected in Minor *v.* Happersett, 21 Wall., 172, by which it will be seen that they were not alike in any two of such States.

It may be suggested, however, that the inhabitants of the original States became *ipso facto* citizens of the United States. The reason of that was that the people of the original States were the persons who associated themselves together to form a nation, and consequently were its original citizens. Minor *v.* Happersett, *supra.* The inhabitants of Nebraska were not creating a new and independent government, and by the admission of Nebraska into the Union they did not throw off their allegiance to a foreign power. The principle which fixed and determined the status of the original States can have no application to this case.

The language of the enabling act has no reference to the status of the inhabitants of the original States at the time the State came into the Union any more than it can be said to have reference to the footing or the relative rights of the original States at the time when a Union of States was formed. It is self-evident that no Territory can now be admitted into the Union as a State with all the rights and privileges which were possessed by the original States when they came into the Union. This may be illustrated by reference to the fourteenth amendment to the Constitution of the United States, which since its adoption forbids the States from exercising powers and privileges which the original States could exercise at
84 the time the Federal Union was formed. It is not an answer to this illustration to say that Nebraska was admitted into the Union before the adoption of the fourteenth amendment, because we find substantially the same language in the enabling acts by which new States have been admitted into the Union since the adoption of that amendment. We think it clear, both from the language of the enabling act and from constitutional and political history, that the provisions of the enabling act by which Nebraska was admitted into the Union on an equal footing with the original States must be used in the present tense—that is to say, was admitted with the same relative rights which the original States held under the Constitution at the date Nebraska was admitted. If this view be correct, the words "equal footing" could not be construed as naturalizing all aliens who were then inhabitants of the State, for the reason that aliens residing at that time within the limits of the original States were not citizens of the United States.

If it be true that the admission of a State naturalizes all aliens who were inhabitants of the Territory at the time, then all that need be done by newly arrived im-igrants to be transformed from alienage into citizenship would be to take up their abode in a Territory prior to its admission as a State into the Union. Congress foresaw the danger attending the naturalization of aliens before they had acquired a knowledge of the Constitution and laws of our country, and consequently required a residence for a period of five years, and, in addition to that, proof should be taken before a proper court that they were of good moral character and attached to the principles of the Constitution of the United States before they could

be admitted to citizenship. This policy of our Government would be entirely overturned by holding that aliens become citi-
85 zens by the mere admission of a Territory as a State. This rule would admit to citizenship foreigners who do not possess the qualifications to be admitted to American citizenship, and that, too, without their consent.

The 8th section of the act of Congress approved February 22, 1889, which enabled the inhabitants of the Dakotas, Montana, and Washington to form constitutions and State governments and to be admitted into the Union, provides: "And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original States, from and after the date of said proclamation."

This language is in substance the same as that contained in the enabling act by which Nebraska became a State.

The necessary conclusion from the rule of construction contended for by respondent in this case would make the Chinese residing in the Dakotas, Montana, and Washington when those States were admitted into the Union citizens of the United States, while the courts have uniformly held that the Chinese were not proper subjects for naturalization under our present laws.

86 If we were to give to the admission of Nebraska as a State into the Union the force and effect of a treaty or cession between the United States and the Territory of Nebraska, still it could not control the present case or the citizenship of the respondent for the reason that he was born in Ireland, of alien parents, and was a subject of the Queen of Great Britain and Ireland at the time of the admission of Nebraska as a State. His political relationship to this foreign power could not be made subject to any compact between Nebraska and the United States to which Great Britain was not a party. Tobin *vs.* Walkinshaw, I McAllister, 186.

The opinion which we hold is supported by other sections of the enabling act. Section 13 provides that the "laws of the United States, not locally inapplicable, shall have the same force and effect within the said State as elsewhere within the United States." The naturalization laws of the United States were not and are not locally inapplicable to the State of Nebraska. These laws were in force in the State of Nebraska, and, if so, there is no reasonable escape from the proposition that aliens must comply therewith in order to become citizens of the United States.

Section 1 of the enabling act provides "that the inhabitants of that portion of the Territory of Nebraska included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves a constitution and State government with the name aforesaid, which State, when so formed, shall be admitted into

the Union as hereinafter provided." In the title the subject of the act is designated "the people" of Nebraska, in the purview the "inhabitants." We know that the framers of the act when they used these terms did not mean all of the people nor all of the inhabitants then domiciled in Nebraska. In this connection attention is called to the act of Congress of May 30th, 1854, usually called the organic act. At the date of its passage there were no people
87 nor inhabitants of Nebraska upon whom said act was designed to operate, but it was those thereafter to become domiciled there for whose benefit the said organic act was designed. Section 5 of said act provides "that every free, white male inhabitant above the age of twenty-one years, who shall be an actual resident of said Territory and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election and shall be eligible to any office within said Territory; but the qualifications of voters and holding office at all subsequent elections shall be such as shall be prescribed by the Legislative Assembly: Provided, That the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such and shall have taken an oath to support the Constitution of the United States and the provisions of this act."

The qualifications of voters and of holding office in said Territory remains substantially the same as above established by the organic acts at the date of the passage of the enabling act and of the actual admission of Nebraska into the Union as a State, the Legislative Assembly having prescribed no different rules, except upon some points not material to the present inquiry.

When it is borne in mind that the sole purpose of the enabling act was to invite and enable Nebraska to form for herself a constitution and become admitted into the Union as a State, it is obvious that this invitation would be addressed to those in whom the law had vested the power and the right to put the political power of the Territory in motion and to control its action to the accomplishment of the purpose in hand. Who were they but those in whom the elective franchise had been vested by the organic law and wisely left by the "Legislative Assembly." The "prople of Nebraska" then mentioned in the title and the "inhabitants"
88 mentioned in the first section are the free, white male inhabitants above the age of twenty-one years, actual residents of the Territory, citizens of the United States, and those who have declared on oath their intention to become such and shall have taken an oath to support the Constitution of the United States. Why should any other than these have been mentioned or intended? None other were allowed to vote for representatives to form a convention to draft a constitution for the proposed State, nor to vote upon the acceptance or rejection of such constitution as might be formed by such convention. This is made plain by reference to the provisions of section 3 of the enabling act, which provides "that all persons qualified by law to vote for representatives to the General Assembly of said Territory shall be qualified to be elected, and they

are hereby authorized to vote for and choose representatives to form a convention under such rules and regulations as the Governor of said Territory may prescribe, and also to vote upon the acceptance or rejection of such constitution as may be formed by said convention," etc.

Persons of foreign birth residing in the Territory of Nebraska who had not declared their intentions to become citizens of the United States and taken an oath to support the Constitution of the United States were as powerless to make a constitution and government of the new State of Nebraska as though they had remained in the country of their birth.

But it is claimed that the invitation of the enabling act was extended to all the inhabitants of the Territory, including unnaturalized foreigners who had neither declared their intention to become citizens nor taken an oath to support the Constitution of the United States, to take part in the formation of a constitution and State government, and they having done so, it is argued that they
89 became citizens of the United States, without oath of allegiance to the United States or of abjuration to their mother country, simply by having taken part in the formation of the constitution and State government; in other words, that they came in with the State. We have seen that this class of persons were not recognized as possessing any political status in the said Territory whatever. They could not legally vote at any election, nor were they entitled to hold any public office. The Legislative Assembly, while possessing the power to confer certain political rights upon this class of persons, never exercised it; but, on the contrary, at its first session, enacted a criminal code, section 131 of which provided that "if any person wilfully vote who * * * is not a citizen of the United States or who is not duly qualified from other disability to vote at the place where and time when the vote is to be given he shall be fined in a sum not exceeding three hundred dollars or imprisoned in the county jail not exceeding one year." This law was subsequently amended, and at the date of the admission of Nebraska into the Union as a State it stood as follows:

"SECTION 38. Any person who shall vote in this Territory * * * who is not a citizen of the United States or declared his intention to become such as provided by law, he knowing the same, shall, on conviction thereof, be imprisoned in the penitentiary and kept at hard labor not less than six months nor more than three years." Revised Statutes of Nebraska Territory, 1866, page 157.

Can it be supposed that the laws would have been kept in force for twelve years denying to foreigners who had not declared their intention to become citizens of the United States the right to vote, and providing a punishment against them should they exercise such right, if it had been the law that upon the admission of Nebraska as a State all non-declaring foreigners residing in the Territory were by the mere force of such admission, and whether
90 they desired it or not, became full-fledged citizens of the United States? Most certainly not. It can be imagined that had the organic act recognized non-declaring foreigners who might be

domiciled in the Territory then being organized as voters therein and entitled to take full part in all its political affairs, or had the Legislative Assembly thereof, as it was probably empowered to do by such organic act, conferred the right to vote and hold office upon such foreigners, then, upon the enactment by Congress of a law to enable the "people," the "inhabitants," of such Territory to form a constitution and State government and for its admission into the Union, that these words, the "people" and the "inhabitants," were meant to embrace such foreigners; but where, as in this case, such foreigners had been throughout the legislation of Congress in reference to the Territory and throughout the legislation of the Territory itself denied all participation in the affairs of the Territory, we do not think that in the use of the terms Congress intended to invite or enable any to participate in the formation of a constitution and State government who had been thus excluded, but only such as could vote for delegates to a constitutional convention without violating the laws of the Territory or subjecting themselves to criminal prosecution.

The view which we have expressed, to the effect that the inhabitants of the Territory did not become citizens of the United States by the admission of such Territory as a State, is sustained by judicial decision. In McKay *vs.* Campbell, 2 Sawyer, 125, it appears that McKay was born an alien. He was an inhabitant of Oregon at the time that Territory was admitted as a State into the Union, and afterwards claimed to be a citizen of the United States. The court held that he could not claim citizenship except through naturalization, and further held that the treaty of 1846 did not make him a citizen of the United States, and that there was nothing in the treaty that operated as a naturalization of inhabitants.

91 We quote from the opinion: "The plaintiff, being the child of an unnaturalized citizen and unnaturalized himself, cannot claim to be an American citizen upon the single ground that he was born upon the soil of the United States. Nothing that had happened since his birth can add to or take away from the strength of his claim."

After the birth of the plaintiff, McKay, and during his residence in Oregon, that Territory had been admitted into the Union as a State, without an enabling act, it is granted; but will any one contend that she was for that reason any less admitted into the Union upon an equal footing with the original States, or that Oregon is not to-day upon an equal footing in all respects with Nebraska? The admission of Oregon as a State, a like event, which it is claimed made citizens of all aliens domiciled in Nebraska, was thus declared by the court as not adding to the rights of a person born in the allegiance of a foreign power to a claim of American citizenship.

The State *vs.* Primrose, 3 Alabama, 546, is exactly in point. The defendant was indicted in the circuit court of Mobile for a libel and pleaded in abatement that one of the grand jurors by whom the indictment was returned was not a citizen of the United States, but an alien. The juror was born in Ireland and came to Louisiana

in 1811, where he remained until after the admission of Louisiana into the Union, and in the year 1814 he removed to the State of Alabama, where he was residing when he served as a grand juror. He had never been naturalized under act of Congress, but it was claimed that as he was an inhabitant of the Territory of Louisiana when it was admitted into the Union, he thereby became a citizen of the United States. Mr. Justice Ormond, in delivering the opinion of the court, says: "The question to be determined is whether the fact that a person was an inhabitant of the Territory of Louisiana previous to its admission into the Union by virtue of the act of Congress of the 20th of Feb., 1811, will constitute such person a citizen of the United States."

92 This act, which was to enable the people of the Territory of Orleans to form a constitutional and State government and for the admission of such State into the Union on an equal footing with the original States, authorizes the "inhabitants" of the Territory to form for themselves a constitution and State government, etc.

"As the citizenship of the juror is supposed to flow from his being an inhabitant of the Territory of Louisiana at the time of the passage of the act of Congress of 1811, previously cited, it becomes necessary to consider the precise import of a term from which such consequences are to arise. By the term inhabitant of a place or country we understand one who has his domicile or fixed residence there, in opposition to one who is a mere sojourner or temporarily resident in the place or country. Bouvier's Law Dic., 504; 1 Dall., 480. It by no means, however, follows that an inhabitant is a subject or citizen; a foreigner permanently resident is as much an inhabitant as if he were a citizen or subject."

By the term "inhabitants," therefore, in this act was merely meant the mass constituting the body politic, who were authorized to form a State constitution preparatory to admission into the Union. It certainly was not the intention of Congress, either in this or in any of the other acts for the admission of new States into the Union, to do more than to prescribe the terms on which such State might be admitted. That it was not intended by the act to confer citizenship is conclusively shown by the 2nd section of the act prescribing the qualification of the voters for representatives to the convention which was to form the State constitution. They were required to be free white male citizens of the United States, having resided one year in the Territory and paid taxes. Now, if the intention had been that by the admission of the State into the Union all the inhabitants became citizens of the United States, there would have been no propriety whatever in confining the elective franchise to those who were then citizens.

93 "The acts for the admission of Louisiana into the Union does not differ in any important particular from any of the other acts of Congress passed for the same purpose before and since. The act for the admission of Alabama into the Union is precisely similar; and if the pretension set up is well founded, as the juror was an inhabitant of Alabama before and at the time of its admission

into the Union there would be no necessity to resort to his residence in Louisiana to establish his citizenship, unless the fact that the territory constituting the State of Louisiana was acquired by cession, since the formation of the Federal Government affects the question. But we apprehend that the utmost which could be claimed for the residents of States thus circumstanced would be that they should be placed on the same footing with those residing in States formed from the public domain which belonged to the States at the formation of the Federal compact."

We have carefully examined the two earlier cases in Louisiana—United States *vs.* Leaverty *et al.*, 2 Martin, 185, and Desbois case, 3 Martin, 733—which announce a contrary doctrine, but we cannot accept the reasoning therein to be sound. These cases assume as an accepted proposition that the admission of a State made the inhabitants thereof citizens of the United States. This assumption being not well grounded in reason and without judicial precedent, we do not feel bound to follow it. It is a matter of common knowledge that aliens residing in the Territory of Nebraska who had declared their intention of becoming citizens of the United States completed their naturalization after the State was admitted to the Union, and those who, although inhabitants of the Territory of that time, had not then declared their intention to become citizens of the United States, after the admission of the State, respectively at their several convenience, proceeded to declare such intentions before the proper officers, and, after the expiration of the prescribed time, to com-
94 plete their naturalization in some one of the courts having jurisdiction. The same practice has uniformly prevailed in other States, so far as our knowledge extends. All this would have been unnecessary if the admission of the State into the Union had the effect of admitting all aliens to become citizens of the United States.

Cryer *vs.* Andrews, 11 Texas, 170; Barrett *vs.* Kelley, 31 Texas, 476, and opinions of the attorneys general, vol. 13, page 397, are to the effect that all persons who were citizens of the Republic of Texas at the date of its annexation to the United States *because* citizens of the United States by virtue of the collective naturalization effected by that act. There can be no doubt that by the merger of the Republic of Texas in the United States in 1845 the allegience of the inhabitants of Texas was transferred to the Government of the United States. At the time of the annexation of Texas she was an independent republic, and by the union of the two Governments the citizens of Texas became citizens of the United States; but it is evident that such doctrine is not applicable here, for the reason that the Territory of Nebraska at the time it became a State sustained an entirely different relation to the Government of the United States than that of the Republic of Texas at the date of its annexation.

It was not supposed by the framers of our present constitution, nor the electors of the State who voted on the question of its adoption or rejection, that the alien inhabitants of the United States who were in the Territory at the date of its admission into the

Union as a State became citizens of the United States by such admission. A citizen of the United States was definately understood and accepted by every one to be a person who became such by reason of his birth, or a person of foreign birth who has been duly naturalized under the provisions of the uniform rule of naturalization established by Congress.

95 This is clearly the meaning that should be given to the words "citizens of the United States" as used in section 2 of article 5 of the Constitution.

It is alleged in the information and admitted by the answer that the respondent was an alien by birth. His original status is therefore presumed to continue until the contrary be shown. Hannstein *vs.* Lanham, 100 U. S., 483. Sufficient facts were not alleged in the answer to show that he became a citizen of the United States two years prior to the last general election. We are therefore forced to the conclusion that he was at the date of the election ineligible to the office of Governor. It is proper to state in this connection that the facts set up in the answer show that the respondent has for many years honestly believed he was a citizen of the United States, and that his citizenship had never been questioned prior to November last. In holding as we do, that he is not legally entitled to exercise the duties of the office of Governor, we are but giving force and effect to a plain provision of our State constitution which we have no right to disregard or refuse to enforce. We come now to the consideration of the question, is the relator entitled to the office of Governor? The determination of this point involves the construction of sections 1 and 16 of article 5 of the Constitution, which are as follows:

"SECTION 1. The executive department shall consist of a Governor, Lieutenant Governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings, who shall each hold his office for the term of two years from the first Thursday *and* (after) the first Tuesday in January next after his election and until his successor is elected and qualified," etc.

"SECTION 16. In case of the death, impeachment and

96 notice thereof to the accused, failure to qualify, resignation, absence from the State, or other disability of the Governor, the powers, duties, and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the Lieutenant Governor."

The provisions of the first section are plain and unambiguous. It provides that the Governor shall hold his office for two years "and until his successor is elected and qualified." If section 1 stood alone it could not be successfully disputed that it was not only the privilege but the duty of the Governor to hold the office until his successor shall be duly elected and qualified. People *vs.* Orborne, 7 Colo., 605; Tappan *vs.* Gray, 9 Page, 506; People *vs.* Bissell, 49 Cal., 407; People *vs.* Whitman, 10 Cal., 38; State *vs.* Mullen, 46 Ind., 307; State *vs.* Lush, 18 Mo., 333; Commonwealth *vs.* Hanley,

9 Pa. St., 513; State *vs.* Jenkins, 43 Mo., 261; State *vs.* McMillen, 23 Neb., 389; Carr *vs.* Wilson, 32 West Virginia, 419.

Under the provisions of section 16, quoted above, the duties of the office of Governor devolve upon the Lieutenant Governor in certain contingencies, among which are the failure of the Governor elect to qualify and disability of the Governor. The words "other disability" as used in the section have no reference to the ineligibility of the person to be elected to the office, but were intended by the framers of the constitution to cover any disability of the Governor not specially enumerated in the section occur-ing after the commencement of his term of office. The failure to elect a Governor on account of the ineligibility of the person receiving the highest number of votes for the office is not a disability of the Governor. This section also provides in effect that in case the person elected Governor fails to qualify the Lieutenant Governor shall act. By "failure to qualify" is meant failure to give the bond and take the oath of office required by the Constitution; it was intended to
97 apply to a case where a person possessing the constitutional qualifications to hold the office has been elected but does not qualify. It cannot be said that there has been a failure to qualify where no person has been elected. This construction gives effect to the language of section 1 of article 5 of the constitution, which provides that the Governor shall hold his office "until his successor is elected and qualified." Where there is no person elected, the Governor holds over. It is a familiar rule governing the construction of a constitution that effect, if possible, must be given to its provisions.

A similar question was decided by the court of appeals of Virginia in *Ex parte* Lawhorne, 18 Gratt., 85. The report of that case shows that Francis Pierpont was elected and qualified as Governor of that State for the term of four years from the first day of January, 1864. On the 13th day of January, 1868, no successor to him having been elected or qualified, Governor Pierpont granted a full and immediate pardon to James Lanhorne, who was then confined in the penitentiary under a sentence for grand larceny. The superintendent of the penitentiary refused to release him on the ground that Pierpont's term of office had expired on January 1st, 1868. Lanhorne applied to the court for a writ of *habeas corpus*.

Section 22 of article 6 of the constitution of Virginia provides that "judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices after their term of service *have* expired, until their successors are qualified."

Section 1 of article 5 of that constitution fixes the term of Governor at four years, commencing on the 1st day of January succeeding his election, and makes him ineligible to the same office for the term next succeeding that for which he was elected.

Section 8 provides for the election of a Lieutenant Governor at the same time and for the same term as the Governor.

Section 9 provides that "in case of the removal of the Governor from office or of his death, failure to qualify, resignation, re-

98 moval from the State, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the Lieutenant Governor, and the General Assembly shall provide by law for the discharge of the executive functions in other necessary cases.

The court held that the constitution made it obligatory upon Pierpont to discharge the duties of the office of Governor until his successor was qualified, and that the pardon granted by him was valid.

It is insisted by counsel for the respondent that Thayer's term of office expired when Boyd was elected and qualified. The proposition assumes the question in dispute—was Boyd duly elected? The inquiry is not whether he received a plurality of votes, but did he have the qualifications to be elected? We have already given a negative answer to this. Elected as used in the constitution means the choosing of a person eligible to be chosen. It is argued by counsel for respondent that the relator is not entitled to hold the office because it does not appear that he requalified within ten days after the time when his successor should have qualified. Section 17, chapter 10, Compiled Statutes, relating to "bonds and oaths," reads as follows:

"SECTION 17. When the incumbent in an office is re-elected or re-appointed he shall qualify by taking the oath and giving the bond as above directed; but when such officer has had public funds or property in his control his bond shall not be approved until he had produced and fully accounted for such funds and property; and when it is ascertained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor or by the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified."

Section 5 provides that the official bonds and oaths of all officers elected at a general election shall be filed in the proper office
99 on or before the first Thursday after the first Tuesday in January following the election.

Section 15 provides in substance that if a person elected or appointed to an office fails to qualify within the time provided by law, his office shall *ipso facto* become vacant and the vacancy shall be filled by election or appointment.

The provisions of section 15 were not intended by the Legislature to apply to a case where the incumbent of an office holds over on account of the failure to elect a successor, but have reference to cases where the persons elected to a public office have never taken the oath and given the bond required by law and who have never entered upon the discharge of the duties of their office. Hold-over officers are governed and controlled by section 17, above quoted. It requires such an officer to qualify anew within a specified time when it is ascertained that he holds over by reason of the non-election or non-appointment of a successor or when the successor fails to qualify. Ascertain is "to find out or learn for a certainty by trial, examination, or experiment." How could Thayer determine that

no successor was elected? The returns of the election at which a successor was to be chosen showed that the respondent received a plurality of the votes. Whether he was elected depended upon whether the respondent was eligible to be elected. That question could be determined only by judicial inquiry; and when, upon trial, it is ascertained that the relator is entitled to hold over on account of the ineligibility of the defendant, the relator is required to requalify. This construction also gives effect to section 711 of title 23 of the Code of Civil Procedure relating to proceedings by *quo warranto*, which provides that "if judgment be rendered in favor of such claimant he shall proceed to exercise the functions of the office after he has qualified as required by law." It follows that the answer fails to state a defense to the information, and the demurrer is sustained. A judgment of ouster must be entered against the respondent.

Cobb, Ch. J., concurs.

100 *Opinion. Filed May* 5, 1891.

STATE *ex Rel.* THAYER
v.
JAMES E. BOYD. } No. 4610.

MAXWELL, *J.*, dissenting:

Leave was given the relator to file an information in his own behalf in an action of *quo warranto* to determine his right to continue in the office of Governor of the State of Nebraska from the first Thursday after the first Tuesday in January, 1891, for the period of two years, upon the alleged ground that the defendant was not a citizen of the United States for two years prior to the election in November, 1890, and therefore not eligible to the office of Governor of the State.

The court, in making the order allowing the relator to filed his information, qualified it so as to permit the Lieutenant Governor to intervene should the court, on the final determination of the case, find that the defendant was not eligible to the office, and it would thus become necessary to determine who should succeed him—whether the relator or the Lieutenant Governor.

In his answer the defendant "admits that the attorney general of this State refuses to prosecute this action and protests and insists and avers the fact to be that the information herein is insufficient in law to require the respondent to make answer thereto. For that reason it does not show that said John M. Thayer has any right or title to the said office of Governor of Nebraska or that he has any right, title, or authority to institute, maintain, or prosecute this action, and for that said information does not state facts sufficient to constitute a cause of action.

Respondent admits the allegations of the first, second, third, fourth, and fifth paragraphs of the information, except as hereinafter shown.

Respondent shows to the court that the said John M. Thayer was,

at the regular State election held in the State of Nebraska in November, A. D. 1888, elected to the office of Governor of this State for a term thereof commencing in January, 1889, and that upon the canvass of the votes cast at said election he was duly declared
101 to be so elected; that the term of said office is fixed by the Constitution to commence on the first Thursday after the first Tuesday in January succeeding the election and continuing for a period of two years and until his successor shall be elected and qualified.

That the laws of Nebraska at all the times herein mentioned provided that if a qualified incumbent of the office holds over by reason of the non-election or non-appointment of a successor he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified by taking the oath of office, executing it in having approved and filed for record his official bond in the sum of fifty thousand dollars, conditioned for the faithful performance of the duties of the office, as by law required.

That the said John M. Thayer continued as the actual incumbent of said office down to the time when this respondent qualified as Governor of this State, on the 8th day of January, 1891, which was the first Thursday after the first Tuesday in January succeeding the election in question.

That the said John M. Thayer has never since the 8th day of January, 1891, qualified anew as Governor of the State of Nebraska; that he has not since that date taken or filed the official oath required by law, nor has he had his official bond executed or approved or filed for record, as by law required, to qualify him anew if no party was elected to hold said office of Governor from and after the said 8th day of January, as he alleges in his information, but which respondent denies, and in this behalf further alleges the fact to be that after the said 8th day of January, 1891, the respondent entered into the office of Governor of the State of Nebraska, and the said John M. Thayer from that time and thereafter wholly surrendered, abandoned, and removed from said office, and has not since in any manner, directly or indirectly, occupied or possessed the
102 same, or assumed or pretended to assume to perform any of the functions thereof, and wholly surrendered the same and vacated said office.

Answering the sixth paragraph of said information, the respondent admits that after his election to the said office and the canvass of the returns & after he had been declared elected to the said office by the speaker of the house of representatives, in the presence of a majority of the Legislature, as required by law, he, on the 8th day of January, 1891, took the oath of office, executed and filed his official bond, did all other acts and things required by law of him to be done to qualify and entitle him to enter into the possession, use, and employment of said office and to discharge the duties thereof; and the respondent denies that he has usurped or invaded the said office or unlawfully attempted at any time to hold said office and perform the duties thereof, but avers the fact to be that at and from the commencement of the term of his said office, from January 8th,

1891, he has been and now is the duly elected and qualified Governor of the State of Nebraska, in the quiet, legal, and actual possession and enjoyment of said office and discharging its duties; that he has been recognized so to be by all of the departments and officers of the State government.

That the said John M. Thayer ceased to be the incumbent of said office in law and in fact with the expiration of the 8th day of January, 1891, and prior to the commencement of this action.

Answering the eighth paragraph of said information, the respondent denies all the allegations thereof, except that he was born in Ireland, of alien parents, in the year 1834; that he was brought to this country, when about ten years of age, by his father, Joseph Boyd, who settled, about the year 1844, in Belmont county, Ohio, where he resided for several years, and thereafter removed to Zanesville, Muskingum Co., Ohio, where he has ever since resided.

Respondent also admits that his father, on or about March 5th, 1849, when respondent was about fourteen years of age, declared his intention to become a citizen of the United States and to re-
103 nounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state, and sovereignty whatever, and particularly the Queen of Great Britain and Ireland, and that the alleged exemplification of the record thereof copied in said information respondent believes is a true copy.

Answering the 8th paragraph of said information, respondent says he admits the facts therein alleged, except as in this answer otherwise averred, but denies the conclusions of law and facts therein stated.

That his father, for forty-two years last past, has enjoyed and exercised all of the rights, immunities, and privileges and discharged all the duties of a citizen of the United States and of the State of Ohio, and was in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio, at all times disclaiming and abjuring allegiance to every foreign prince, potentate, state, or sovereignty; that all of said times said Joseph Boyd behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same; that when the said Joseph Boyd settled in the State of Ohio as aforesaid it was his *bona fide* intention to make the United States his permanent residence; that at that time he did in fact disclaim, renounce, and abjure all allegiance and fidelity to the Queen of Great Britain and Ireland and to every other foreign prince, potentate, state, and sovereignty, and for forty years acted in the belief that he was a citizen of the United States, all said times exercising the elective franchise without question or challenge, voting for all officers of the State and Federal governments the same as a native-born citizen of the United States and of the State of Ohio.

That about the year 1870 said Joseph Boyd was elected to the office of justice of the peace in said Muskingum county, Ohio, and thereupon took an oath to support the constitutions of the
104 United States and of the State of Ohio, and for several years

held said office, exercising all the rights, franchises, powers, and duties of said office, and has for years last past held office under the constitution and laws of Ohio, to wit, weighmaster in the city of Zanesville, which office he now holds.

That he was informed by his father as early as the year 1855 that he, the said Joseph Boyd, was a citizen of the United States and entitled, in law and in fact, to all the rights, privileges, and immunities of a citizen of the United States and of the State of Ohio, and that ever since said time this respondent has so believed and accepted the fact so to be, and never heard the fact challenged or questioned till after he was elected to the office of Governor of this State, in 1890.

That he did upon arriving at the age of 21 years exercise the election franchise in said Muskingum county, Ohio, in the fall of 1855.

The respondent further alleges, on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws, so as to admit and constitute him a full citizen of the United States thereunder, he having exercised the rights of citizenship herein described, and at said time informed respondent that such was the fact; that when his father applied to be registered in Ohio in October, in 1890, under a new law, he was required to produce his citizenship papers, and being unable to find all of them, *of* he appeared before said court of common pleas of Muskingum county, at the October term thereof, 1890, and the proceedings described in the 9th paragraph of the information were had as therein set out; but respondent avers the fact to be, on information and belief, that in the matter of said proceedings said Joseph Boyd acted unadvisedly and ignorantly, the said last-named proceedings being in that event unnecessary.

105 That in the year 1856, at the age of 22, he left his father's home in Ohio in the firm belief that he, respondent, was a citizen of the United States in law and in fact, to establish himself in life; that he went to the State of Iowa, where he resided for a few months.

In the month of August, 1856, respondent removed to the Territory of Nebraska, which was then to a large extent a wilderness, and settled in Douglas county, where he resided for two years, working at his trade as a carpenter, and in 1857 he was elected county clerk of said county, and took an oath to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created.

Respondent removed to what is now Buffalo county, near old Fort Kearney, which was then upon the extreme frontier, in the fall of 1858, where he engaged in the business of farming, in the midst of great perils from hostile Indians, suffering years of extreme hardship. In 1864, at the time of the Indian outbreak in said vicinity, when the lives and property of settlers were destroyed or endangered, when many settlers were massacred, when hostile Indians were killing cattle before the door of the home of his family, he

volunteered his services as a soldier of the United States, which were accepted by the United States Government, he being sworn into its military service by order of General R. B. Mitchell; that he served as a soldier of the United States, without compensation or reward, to protect the men, women, and children of the frontier and to maintain the authority, honor, and flag of the United States Government.

In the year 1866 respondent was elected a member of the house of representatives of Nebraska to represent the counties of Buffalo and Hall; that he served as such officer in the following session of the Legislature, to which was submitted the proposition of the Congress of the United States to accept the first constitution
106 of this State with the conditions imposed by the act of Congress known as the enabling act, below named; that before entering upon the duties of said office he took the oath required by law and swore to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created.

In 1868 respondent removed to Douglas county, where he has since resided.

In the year 1871 respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a State constitution, and, after taking the oath required by law to support the constitutions of the United States and State of Nebraska, in fact served as a member of said convention.

In the year 1875 the respondent was elected by the electors of said county a member of the convention of the people of the State of Nebraska to form a constitution, which convention discharged that duty in the year 1875, which resulted in forming the constitution under which the government of this State has since existed. Respondent, after taking the oath required by law to support the constitutions of the United States and of this State, in fact served as a member of said convention.

In 1880 respondent was elected and acted as president of the city council of the city of Omaha.

In 1881 respondent was elected mayor of the city of Omaha, and served in said office for two years.

In 1885 respondent was again elected to said office of mayor, and served for two years; and before taking the office of mayor each of said times respondent took an oath to support the constitutions of the United States and of the State of Nebraska.

That during said period of over thirty years he has exercised the elective franchise in said Territory and State of Nebraska
107 and enjoyed all the rights, privileges, and immunities of a citizen of the United States and of said Territory and State.

That for over 32 years past he has been in fact and in law a citizen of the United States and of said Territory and State; that neither the United States nor the Territory or State of Nebraska has ever challenged his citizenship or sought to oust him of the franchise actually enjoyed and exercised by him to be a citizen of the United States, and that it is not competent for this relator so to do;

that if his said right and privilege of being a citizen of the United States is subject to challenge, it is solely for the United States, in its sover-ign capacity, to challenge the same.

That he was at the time of the election in question and for more than two years prior thereto eligible to be elected to and to hold said office of Governor for the term in question.

That in 1849 it was his *bona fide* intention to be a citizen of the United States, and that he then renounced and abjured forever all allegiance and fidelity to every foreign prince, potentate, state, or sover-ignty whatever, and particularly the Queen of Great Britain and Ireland; that during all the time since he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and all said time has absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state, or sover-ignty, and particularly the Queen of Great Britain and Ireland.

That after his election as Governor and after he had learned for the first time that his citizenship had been questioned, and on December 16th, 1890, he went before the district court of the United States for the district of Nebraska for the purpose of removing all doubts that might arise thereafter in respect thereof, and by
108 petition to said court represented to that court the facts necessary to be known in that behalf touching his said history and citizenship of the United States, insisting therein that he was and had been for more than two years next preceding his election to the office of Governor, in Nov., 1890, a citizen of the United States, and also representing to said court that a question had been raised as to his said citizenship; whereupon said court by its judgment found, determined, and adjudged that he was in fact and in law a full citizen of the United States, and respondent avers that he is and for many years last past has been a citizen of the United States within the meaning and requirements of the acts of Congress of the United States; a copy of which petition, judgment, and record is hereto attached and made part of this answer.

Respondent denies the allegations of the 9th, 10th, and 11th paragraphs of said information, except that he refuses to surrender said office of Governor to the said relator and all other allegations of said information not hereinbefore admitted or specially answered.

Wherefore respondent prays to be hence dismissed with his costs in this behalf most wrongfully expended, and for such other and further relief as may be just and proper."

The relator demurred to the answer upon the grounds that the facts stated therein are not sufficient to constitute a defense to the information.

In the argument on the demurrer the defendant contends that the remedy by contest is exclusive, and therefore the court has no jurisdiction.

In State *v.* Marlow, 15 O. S., 108, the supreme court of Ohio, in construing the constitution of that State and a statute passed in pursuance thereof in regard to contests, held that the remedy pro-

vided by statute was exclusive, and therefore an information in *quo warranto* would not lie.

A few other cases to the same effect may be found.

We are of the opinion, however, that under our constitu-
109 tion the remedy by contest is not exclusive, and therefore that an information in a proper case may be maintained.

It will be observed that it is alleged in the answer that the "relator fully surrendered, abandoned, and removed from said office and has not since in any manner, directly or indirectly, occupied or possessed the same or assumed or pretended to assume to perform any of the functions thereof, but wholly surrendered the same."

It is a fact well known that about the 20th of January, 1891, in order to prevent scandal, injurious to the good name of the State, by having two persons endeavoring to act as Governor thereof, the court, through its chief justice, stated to the relator that Governor Boyd was the acting Governor, to be recognized as such until the determination of this suit, and that the relator would lose nothing by quietly leaving the building, and in case it should eventually be found that he was entitled to the office his right would be respected and enforced.

It does not appear, however, from the allegations the precise date at which it is alleged the relator surrendered the office, etc. For aught that appears, it may have been after the promise heretofore spoken of. Neither are the allegations as to abandonment of the duties of the office as explicit as they should be. This is subject to amendment if such amendment was necessary in the case.

The allegations as to the failure to file the bond and take the oath required by statute within ten days from the 8th day of January, 1891, are not necessary to be considered in this connection and will not be discussed.

The allegation of the defendant, "on information and belief that prior to Oct., 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the naturalization laws, so as to admit and constitute him a full citizen of the United States thereunder," in the opinion of the writer, is sufficient on demurrer to show that the father of the defendant,
110 before the defendant was of the age of 21 years, had completed his naturalization, so that thereby the defendant became a citizen of the United States.

It was unnecessary to allege this fact upon information and belief, as all that the law requires in verifying the answer is to state the facts as he believes them to be.

The allegations that follow in regard to Joseph Boyd having exercised the right of citizenship are simply to show that after the year 1854 he regarded himself as being a citizen of the United States and entitled to the exercise of the elective franchise, and he was so regarded by his neighbors.

The further allegation, also in effect, that in consequence of a new registry law taking effect he was unable to register, and therefore to vote, and was compelled to take out his second paper, although he

had previously become a citizen of the United States, is of the same nature.

These allegations, being admitted by the demurrer, would seem to be sufficient, if proved, to constitute a defense to the action.

If the relator desire a more definite statement he should have filed a motion for that purpose.

We must remember that the son had no personal knowledge of the naturalization of his father, but was informed by him that he had been naturalized, and hence that the defendant was a citizen of the United States. Under such circumstances greater latitude should be allowed in pleading than where the party himself had been the actor in the case.

My associates, however, deem the allegations too uncertain, and hence I acquiesce in their views. This defect, however, could, if necessary, by readily cured by positive allegations.

3. It is contended on behalf of the defendant that he became a citizen of the United States by virtue of the several acts of Congress admitting the State of Nebraska into the Union. I must
111 confess that when the proposition was presented, and without an examination of the question, it did not seem to possess the importance which it now assumes.

The act organizing the Territory of Nebraska was approved on the 30th day of May, 1854. The provisions of the act are exceeding liberal, and evidently intended to invite permanent settlers into the Territory. The Territory at that time comprised substantially what has since been formed into five States.

On the 19th of April, 1864, Congress passed an act to enable the people of Nebraska to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States.

Sec. 1 of the act provides "That the inhabitants of that portion of the Territory of Nebraska including the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves a constitution and State government with the name aforesaid, which State, when so formed, shall be admitted into the Union as hereinafter provided."

Upon the foundation of the constitution and ratification of the same, in the manner provided in the act, the president was authorized to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States.

In pursuance of this act a constitutional convention was elected and met in the city of Omaha on the 4th day of July, 1864.

The Territory at that time contained not to exceed 30,000 people. It had furnished more than two regiments of volunteers who were then in the field. The war had cut off or impeded to a great extent the only means of communication with the commercial marts of the country, viz., the Missouri river; hence there was a stagnation of business and the Territory was not increasing in population to any extent.

These things were felt by every member of the convention,
112 and it was the general opinion of the members and the gen-

eral sentiment of the people of the Territory that there was not sufficient population to justify the formation *to justify the formation* of the State government, and that if a constitution was framed and submitted to the people it would be overwhelmingly defeated.

The convention therefore organized by the election of the father of the present Lieutenant Governor as president and other officers, and by a unanimous vote adjourned *sine die*.

Two years later, however, with the close of the war, the building of the Union Pacific railway, and a flow of immigration into the Territory, a desire was felt to form a State government, and thereupon the Legislature prepared a constitution and submitted it to the people of the State at the election held on the 2nd day of June, 1866.

The preamble to this constitution is as follows: "We, the people of Nebraska, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquil-ity, and promote the general welfare, do establish this constitution."

It will be observed that in the first section of the enabling act the inhabitants of what is now the State of Nebraska were authorized to form for themselves a constitution and State government, which in the preamble they assert that they do form.

This constitution was adopted by a small majority, and the first State Legislature met at the city of Omaha on the 4th day of July, 1866, and, after organizing, proceeded to elect senators for the State, one of whom was the relator in this case.

There was strong opposition in the Legislature to the organization of State government, and in the house, consisting of 39 members, but twenty were in favor of, while 19 were opposed to such organization; and in the senate, consisting of 13 members, 7 were in favor of and 6 opposed to State government.

113 As the act of 1864 had not been accepted at the time therein provided, it became necessary for Congress to pass an additional act admitting the State into the Union.

The first section of that act is as follows: "Whereas, on the 21st day of March, A. D. 1864, Congress passed an act to enable the people of Nebraska to form a constitution and State government, and offered to admit said State, when so formed, into the Union upon compliance with certain conditions therein specified; and whereas it appears that the said people have adopted a constitution which, upon due examination, is found to conform to the provisions and comply with the conditions of said act, and to be republican in its form of government, and that they now ask for admission into the Union: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the constitution and State government which the people of Nebraska have formed themselves be, and the same is hereby, accepted, ratified, and confirmed, and that the said State of Nebraska shall be, and is hereby, declared to be one of the United States of America, and is hereby

admitted into the Union upon an equal footing with the original States in all respects whatsoever."

Congress thus construed the word "people" as a synonym with the word "inhabitants."

It will be observed that the act admitting Nebraska into the Union contains provisions which are exceedingly comprehensive.

The constitution and State government "is hereby accepted, ratified, and confirmed, and the said State of Nebraska shall be, and is hereby, * * * admitted into the Union upon an equal footing with the original States in all respects whatsoever."

I have been unable to find as strong language in an act admitting any other State into the Union, and the language is much stronger than that admitting the State of Texas, to which reference will hereafter be made. It is necessary now to enquire
114 how the original States were admitted into the Union.

The preamble to the Constitution of the United States declares that "we, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquil-ity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

In Minor *v.* Happersett, 21 Wall., 165–167, the Supreme Court of the United States in very clear language point out who were citizens of the United States at the formation of the Federal Government.

It is said "there cannot be a nation without a people." The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.

Allegiance and protection are in this connection reciprocal obligations. The one is a compensation for the other; allegiance for protection, and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the word "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the articles of confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a
115 nation and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain

what persons originally associated themselves together to form the nation and what were afterwards admitted to membership.

Looking at the Constitution itself we find that it was ordained and established by "the people of the United States," and then going further back we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain and assumed a separate and equal station among the powers of the earth, and that had, by articles of confederation and perpetual union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them or any of them on account of religion, sover-ignty, trade, or any other pretence whatever.

Whoever, then, was one of the people of either of those States when the Constitution of the United States was adopted became *ipso facto* a citizen, a member of the nation created by its adoption. He was one of the persons associating together to form the nation and was consequently one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were."

The same doctrine had previously been announced in McIlvaine *v.* Coxe's Lessee, 4 Cranch, 214, and other cases, and is stated by Kent, 2 Comm., pp. 1–2.

In United States *v.* Laverty *et al.*, in the district court of the United States, 3 Martin, 733, which seems to have arisen during the last war with Great Britain, where certain persons arrested as alien enemies claimed to be citizens of the United States by virtue
116 of the admission of the State of Louisiana into the Union, it is said: "It is well known that some of these persons have been discharged by one of the judges of the State; but as the marshal and many others are seriously impressed with a belief that they are not citizens, but aliens, it has been deemed proper to obtain the opinion of the judge of the United States."

It is contended by the attorney of the United States that Congress alone have power to pass laws on the subject of the naturalization of foreigners, and that by the Constitution it is declared that the rule for their admission was uniform. On the other hand, it is said that Congress have the power to admit new States into the Union; that this power is not inconsistent with nor repugnant to the other; that the first rule well applies where individual application is made for admission, but is not restricted of the other power, to admit at once great bodies of men or new States into the Federal Union.

The power to admit new States is expressly given by the third section of the fourth article of the Constitution. It had been frequently exercised; and on the 30th of April, 1812, Louisiana was admitted into the Union upon the same footing with the original States.

In what manner has this power been exercised in respect to other

States? On the 30th of April, 1802, the inhabitants of the eastern division of the territory northwest of Ohio were authorized to form for themselves a constitution and State government. This was done, and they were afterwards admitted into the Union. Previous to their admission the people of that country were governed by what is commonly termed the Ohio ordinance. That the population, consisting partly of citizens of the United States and partly of foreigners, may be collected from the provisions of that instrument for their government; that a great body of aliens resided among them is known to many. It is declared that possessing a freehold
117 of fifty acres of land, having been a citizen of one of the States and being a resident in the district, or the like freehold and two years' residence shall be necessary to qualify a man as an elector. Here there are two descriptions of persons: 1st, citizens of the United States with a freehold and actual residence, and, 2nd, persons not citizens with a freehold and two years' residence. Were they not all equally inhabitants, and in the act of admission is there any distinction made? The inhabitants, then, who were authorized to form a State government for themselves must have been all the real inhabitants of the country, citizens or foreigners, and after the admission of the State into the Union must have equally participated in all its advantages, because if a part only were entitled to its benefit all the inhabitants had not formed a government for themselves. Can we for an instant believe that a wise, just, and liberal Government like that of the United States would invite any portion of people who were enjoying self-government in a considerable degree to place themselves in a situation where they would be entirely deprived of it?

I can have no doubt that all the inhabitants of the State of Ohio were admitted citizens of that State by their admission into the Union.

Let us, then, examine and discover (if possible) any difference between the case of that State and this. Louisiana, it is said, was admitted under a treaty of Paris, by which it is stipulated that the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages, and immunities of citizens of the United States. It is, then, contended by some that the word "inhabitants," used in the act of February, 1811, applies solely to those who were inhabitants in 1803.

On the 11th of February, 1811, Congress passed an act
118 "enabling the people of the Territory of Orleans to form a State government." It commences by declaring that the "inhabitants" of all that part of the country ceded under the name of Louisiana shall be authorized to form for themselves a State government. It then goes on and describes two classes of inhabitants: 1st, citizens of the United States and all persons having in other respects the legal qualifications to vote for representatives in the General Assembly. Those qualifications are the same as those of Ohio—two years' residence and a freehold for those who are not citi-

zens. We here find no distinction between the old inhabitant and the new. The man who has been here two years and has fifty acres of land, let him be citizen or alien, is authorized to join in making a constitution for all the inhabitants of Louisiana. The law, then, evidently does not mean merely "the inhabitants at the date of the treaty," and it will be found that the only question in this case is whether Congress had a right to include any others than citizens in their act of admission.

I have already shown that they have exercised this right heretofore; that in the case of the State of Ohio it was not disputed, and it does not become us at this time to question it.

I shall now consider some of the arguments that have been urged by the district attorney and his colleague. Although an attempt was made to distinguish between the two classes of inhabitants (not originally citizens of the United States), yet in truth their arguments go as well to exclude the first as the last class. It is contended that the only mode by which an alien can be naturalized is by a compliance with the uniform rule; that this is the only constitutional mode; that the expression in the treaty that "the inhabitants shall be admitted according to the principles of the constitution" means according to the uniform rule required by the constitution. If so, the creoles of Louisiana are not citizens yet, for not one of them has complied with that law; but, one of the
119 gentlemen has observed, here is a treaty, and treaties are paramount. I can never subscribe to the doctrine that treaties can do away with any part of the Constitution. I will go as far as any one in supporting and observing them in anything not repugnant to it. If, then, the uniform system be the only constitutional one, any other must be unconstitutional, and, though introduced by treaty, is void. If this were the only constitutional mode I should tremble for the fate of the Louisianians; but, fortunately for them and for others, it is not the only one. The expression under the treaty is that they shall be admitted according to the principles of the Constitution—that is, with the consent of Congress, which shall be obtained as soon as possible, and it has been since given. By this construction every part is reconciled; and if Congress in their liberality included others who have since settled in the country they had a right to do so.

It is said that the law respecting alien enemies declares that they shall be apprehended unless actually naturalized, and it is contended that the only actual naturalization is by the uniform rule. This does not follow. If it did, there is scarcely a creole who, in case of a war with France or Spain, would not be subject to its penalties, for none of them have complied with it. The Government has a right, by treaty or by the admission of a new State, to naturalize, and such naturalization is equal to the other."

The same question arose in Desbois' case, 2 Martin's Reports, 185, and the same conclusion reached.

In construing the meaning of the word "inhabitants" it is said, p. 182: "The act of Congress authorizing the formation of the constitution of this State, 10 Laws U. S., 322, was almost literally copied

from that which authorized that of the State of Ohio. 6 Laws U. S., 120. In the first section of the latter the inhabitants of the eastern division of the territory northwest of the River Ohio are authorized to form for themselves a State constitution. In the 4th sec-
120 tions the persons entitled to vote for members of the convention are described—1st, all male citizens of the United States; next, all other persons having, &c.

The word inhabitants, in the first section of this act, must be taken *lato sensu;* it cannot be restrained so as to include citizens of the United States only, for other persons are afterwards called upon to vote. There is not any treaty or other instrument which may be said to control it. Every attempt to restrict it must proceed on principles absolutely arbitrary. If the word is to be taken *lato sensu* in the act passed in favor of the people of one Territory, is there any reason to say that we are to restrain it in another act passed for similar purposes in favor of the people of another Territory?" The cases above cited are referred to with approval by the Attorney General of the United States in volume 13 of Official Opinions, p. 397, who also cites Wheaton's International Laws, by Lawrence, p. 897, in support of the proposition and the cases cited.

The only case we have found holding a contrary doctrine is State *v.* Primrose, 3 Ala., 546. In that case one of the grand jurors which found an indictment was a native of Ireland and settled in Louisiana in 1811, and three years later removed to Mobile, Ala.

The court holds, in effect, that he was not within the terms of the act of Congress admitting Louisiana into the Union.

The most favorable view that can be taken of the case is that the opinion was written offhand and without any previous investigation of the questions involved.

On the main point not a single authority is cited, nor are the principles discussed upon which other courts have placed a construction upon the word "inhabitants."

At the close of the opinion the judge frankly says that he had not seen the decisions of the Louisiana courts, and therefore those cases had no influence on the judgment of the court.

So far as we have observed, after a very careful examina-
121 tion, the doctrine of that case has not been approved in a single instance.

In American Ins. Co. *v.* Canter, 1 Peters, 542, the Supreme Court of the United States said: "On the 2nd of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

There are other decisions of the Supreme Court of the United States

affirming this doctrine, and the same rule is recognized by Congress in contested elections.

In the report of the Committee on Elections in the case of Mr. Levy, delegate from the Territory of Florida, Contested-Election Cases, 2 session, 38 Congress, 41, it is said: "The 4th section of the act of Congress of April 14th, 1802, secures to the infant children of persons naturalized the benefit of their parents' naturalization, provided such children were at the time living in the United States. It matters not whether the naturalization be effected by the act of Congress, by treaty, or by the admission of new States, the provision is alike applicable. The condition of the parent is impressed upon the child."

This right exists under the war and treaty making powers of the Government and the right to control the territory and property of the United States and admit new States into the Union.

There are three modes, therefore, by which citizenship may be acquired—1st, birth; 2nd, proceedings in a court of record; 3rd, by treaty or act of Congress admitting new States.

122 The third proposition will be more fully illustrated by a reference to the admission of the State of Texas into the Union.

On the 1st day of March, 1845, a resolution was adopted by Congress as follows: "That Congress doth consent that the territory properly included within and rightfully belonging to the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union." 5th U. S. Statutes at Large, 797.

In pursuance of this resolution President Jones of Texas called a delegate convention of sixty-one members, who met July 4th, 1845, ratified the proposition made by Congress, prepared a constitution for Texas as a State in the Union, and submitted the same to the people of Texas, who approved it.

In December following a joint resolution was adopted by Congress as follows: "Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Texas shall be one, and is hereby declared one, of the United States of America and admitted into the Union on an equal footing with the original States in all respects whatsoever."

It will be observed that the proceedings admitting Texas into the Union were somewhat similar, although not as full, comprehensive, and complete, as the act admitting Nebraska.

Under the act admitting Texas the inhabitants of Texas, after declaration of independence, became at once citizens of the United States.

In Cryer *v.* Andrews, 11 Texas, 183, the supreme court of Texas say: "When the Congress of the United States, under the authority to admit new States, receives a foreign nation into the con-

123 federacy the laws of these respective nations in relation to

the naturalization of individual emigrants have no application to the respective citizens of each. By the very act of union the citizens of each become citizens of the government or governments formed by this union.

The position which has been sometimes broached, that the citizens of Texas must submit to the laws of naturalization before they can become citizens of the United States, is quite preposterous. No such doctrine was ever admitted or applied to the citizens or inhabitants of Louisiana or Florida—countries acquired by purchase (2 Martin, 158; 3 Martin, 733). Much less is it applicable to the citizens of a State which by voluntary treaty or legislation becomes incorporated into the United States; and if the citizens of Texas cannot be deprived of their franchises as citizens of the United States, neither can citizens of the latter be stripped of the immunities and privileges pertaining to the citizens of this State."

In Barrett *v.* Kelly, 31 Texas, 481, the question was again before the supreme court of that State, and it is said: "When the annexation to the United States took place, in 1845, we became a part and parcel of the United States, and none of the citizens of the United States were aliens to Texas, and the citizens of Texas would be in their own country from the St. Lawrence to the Gulf of Mexico."

Other cases sustaining the same views can be found, but, by reason of the great length to which this opinion has been extended, must be omitted.

In effect, the union of the nine original States naturalized them, which is but another name for naturalization; and where the act for the admission of a new State authorizes the "inhabitants" thereof or "people" therein to form a State government, and the new State so formed is "admitted into the Union on an equal footing with the original States in all respects whatsoever," the conditions are precisely the same as those on which the original nine
124 formed the Union and the other members of the original thirteen came into the Union.

Had Nebraska been one of the original nine States every inhabitant of the State would by the union have become a citizen of the United States. It was "admitted into the Union upon an equal footing with the original States in all respects whatsoever."

Broader or more comprehensive language could not be used, and its meaning cannot be restricted without doing violence to the words employed.

In the third article of the treaty of Paris of April 30th, 1803, by which the territory of Louisiana was acquired, it is provided: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and religion which they profess."

This stipulation could not have been intended to be restricted to the comparatively small number of inhabitants then occupying the

territory which now forms the State of Louisiana, as the land ceded was an empire in extent and has since formed a very large number of States.

The stipulation, therefore, was in effect that on the admission of each State into the Union all the *bona fide* inhabitants thereof should thereupon be entitled to enjoy "all the rights, advantages, and immunities of citizens of the United States."

The admission of a State into the Union partakes of the nature of a treaty with the inhabitants that in consideration of their forming a State government they shall enjoy certain rights, privileges, and immunities.

It may be said to be to some extent a joinder of the law-
125 making and treaty-making powers of the Government.

Both parties derive benefit from the accession of the new State, and it is a matter of public history that Congress has been exceedingly liberal in the benefits conferred upon the new States of the nation. Congress may no doubt impose other conditions upon the inhabitants of a State seeking admission into the Union, but it is sufficient to say that it has not done so in this case.

It is contended on behalf of the attorneys for the relator that because no cases can be found sustaining their view of the law, except the Alabama one, that therefore the question has never arisen, or, if so, been decided adversely to the defendant.

In this, however, they are mistaken. The Louisiana cases, which were decided in the early history of the Government, one of them by a judge of the United States court, have been followed apparently without question, and are cited with approval by the Attorney General of the United States. But in this case it is not necessary to go to the extent of the cases cited.

The answer alleges that Joseph Boyd, the father of the defendant, in the year 1849, and long prior to the time that the defendant reached his majority, declared his intention to become a citizen of the United States.

Had he resided in this State at the time of the adoption of the first constitution he would have been a legal voter therein, and expressly authorized by the enabling act to vote for any officer to be elected by the State of Nebraska.

The maxim of the law is "*partus sequitur patrem.*" That is, "the children follow the condition of their father." 2 Bouv. Law Dict. (14th ed.), 147.

This is the rule in regard to freemen, although a different rule exists in the case of animals and slaves. 1 Bouv. Institute, note, 167–502; 2 Bouv. Law Dict., 147.

126 The son, therefore, was in the same condition when he became of age as his father and was a citizen of the Territory of Nebraska. Congress passed an enabling act for the Territory to admit a certain portion of it as a State, should the inhabitants be so inclined.

In effect Congress said to the future State that, in addition to representation in the Senate and a member having full power in the House, "we'll donate to you 72 sections of land for a university, two

sections in each township for the support of common schools, twenty sections of land for the erection of public buildings at the capitol of the State, all salt springs within the State not exceeding twelve in number, with six sections of land adjoining, and five per cent. of the proceeds of the sale of all public lands lying within the State after deducting the expenses incident to the same."

There was also an appropriation to pay the expenses of the convention. Similar offers have been made to other States, except Texas. It has never been the policy of Congress to force a Territory to accept a State government. In all cases the admission of the State has been on the voluntary application and consent of the people of such State.

Judging the future by the past, the people of a Territory might preserve their territorial character to the end of time, and there would be no attempt on the part of the United States to coerce them into the Union.

The enabling act admitting a State is in the nature of a treaty with the inhabitants of such State.

Now, in the case of Texas there was no treaty. The language of the act of March 1st, 1845, for the admission of Texas is: "Congress doth consent that the territory properly included within and rightfully belonging to the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government to be adopted by the people of said Republic by
127 the deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union." Then follows certain conditions, which were accepted by the State of Texas.

All white inhabitants of the State of Texas at the time of its declaration of independence were held to be citizens of that Republic, and this by the mere force of the declaration of independence. Now, if a citizen of Texas by the mere admission of that State into the Union became *ipso facto* a citizen of the United States, why does not the same rule apply on the admission of a Territory?

It may be said that a foreign state occupies a different position from that of territory belonging to the United States. If so, however, the difference would seem to be in favor of the inhabitants of the territory. They have grown up under the fostering care of the Government and their sentiments and sympathies favorable and friendly to it.

This is illustrated by the very large number of volunteers that were furnished by every Western State. In case of the admission of a State like Texas, containing a considerable mixed and Mexican population, there could not be, from the nature of the case, the same loyalty to the General Government as in the people of the Territories. On reason, therefore, every citizen of the Territory, when it was admitted into the Union, became *ipso facto* a citizen of the United States.

In the one case the enabling act is addressed to the State, and in the other to people of the Territory. The propositions are the same in substance in both, and the result of the acceptance of the propo-

sition the same in both cases, viz., admission as a State upon an equal footing with the original States. Suppose the United States should propose to the people of Manitoba to be admitted as a State and they should accept the proposition and thereupon be admitted as a State of the Union on an equal footing with the original
128 States, would not every citizen of the colony thereby become a citizen of the United States?

The international law as understood in England has never been adopted in this country. In Second Opinions of the Attorney Generals, 356, it is said: "We take our knowledge of international law not from the Municipal Code of England, but from natural reason and justice; from writers of known wisdom and the practice of civilized nations."

In conclusion, I desire to call attention to the case of The Attorney General *vs.* The City of Detroit, 44 N. W. R., 388.

Prior to the admission of Michigan into the Union considerable difficulty had arisen between that Territory and the State of Ohio in regard to the northern boundary of Ohio and the southern boundary of the Territory of Michigan.

The militia seems to have been called out on both sides, although wiser councils prevailed and there were no actual hostilities.

Michigan, however, did not avail itself of the enabling act, which was thought to favor the State of Ohio by giving it the disputed Territory; hence no attempt was made to organize under the enabling act, but the Legislature of the Territory passed an act in pursuance of which a constitution was adopted, Senators elected, and a Representative in Congress. One of the provisions of this constitution was that each male inhabitant residing in the State on the 24th day of June, 1835, should be entitled to vote at such election.

In the case cited it was held that a registration act which failed to provide for this class of voters was unconstitutional and void.

In the examination of the debates relating to the admission of that State the boundary question seems to have been a prominent feature and absorbed the attention of the members, more particularly from Ohio and Indiana, some of whom claimed the State
129 was attempting to break into the Union. There is considerable discussion in regard to the provision of the constitution above referred to, but it seemed to have been generally acquiesced in and the bill finally passed both Houses by a very large majority.

The writer has spent considerable time in the consideration of the case, and has examined every case *pro* and *con.* bearing upon the question, and is forced to the belief that the defendant is a citizen.

In any event, the principal question presented by the answer, the one which controls this decision, is, in the opinion of the writer, a pure question of law arising under the laws of the United States, and must ultimately be determined by the United States Supreme Court, and the decision of this court is at the most but a step in the progress of the case.

This is not a political question. There must be a place where a party can assert his rights, where no inquiry will be made as to his political opinions, where no extraneous matter will be permitted to

intervene to his prejudice. That place is a court of justice. Here the rich and poor, high and low, stand upon an equality, and the court looks not at the litigant, but to his rights as shown by the record, and fearlessly declares the law. In my view, the answer states a complete defense to the action. I have not discussed the rights of the relator to bring the action, as the case has not yet reached a stage where such discussion is necessary. When that point is reached I will make a full examination of the law in relation thereto, and if after such examination the relator's right to the office should be clear, my duty to render judgment in his favor would be cheerfully performed.

130 And on the same day, to wit, May 5th, 1891, the following judgment of ouster was rendered by said court and entered of record, to wit:

Supreme Court of Nebraska. January Term, 1891.

STATE OF NEBRASKA *ex Rel.* JOHN M. THAYER *vs.* JAMES E. BOYD. } *Quo Warranto.* No. 4610. Judgment.

This cause came on for trial upon the information of the relator, the answer of the defendant, and the relator's demurrer thereto, and was submitted to the court on argument of counsel; on consideration whereof the court finds the issues in favor of the relator, and that the said defendant, James E. Boyd, was not elected to the office of Governor of the State of Nebraska.

It is therefore considered by the court that the said James E. Boyd be, and he is hereby, ousted from the office of Governor of the State of Nebraska, and from all the rights, privileges, and emoluments thereof, and that the said John M. Thayer be instated therein, and that said James E. Boyd forthwith deliver to said John M. Thayer all books, papers, and furniture and other things pertaining to said office, and that he pay the costs of this action, taxed at $—.

Thereupon, on the 5th day of May, 1891, there issued out of said court a certain writ of ouster in words and figures following, to wit:

STATE OF NEBRASKA, *ss:*

In the Supreme Court of Nebraska.

To the sheriff of Lancaster county and the bailiffs of said supreme court:

Whereas the State of Nebraska on the relation of John M.
131 Thayer has commenced and prosecuted to final judgment a proceeding upon an information in the nature of a *quo warranto* to oust James E. Boyd from the office of Governor of Nebraska and to reinstate the said John M. Thayer therein; and

Whereas judgment was rendered and entered in said cause on this 5th day of May, 1891, in favor of said relator, John M. Thayer, and against the said James E. Boyd, ousting the said James E. Boyd forthwith from said office of Governor and reinstating the said John M. Thayer therein; and

Whereas the said John M. Thayer has qualified as required by law and is entitled forthwith to the possession of said office and to a writ of ouster removing the said James E. Boyd from said office and from the executive chambers occupied by him:

Now, therefore, you are hereby commanded in the name of the State of Nebraska forthwith to remove the said James E. Boyd from the office of Governor of Nebraska and from the executive chambers in the capitol, at Lincoln, heretofore occupied by the said James E. Boyd as Governor, and reinstate the said John M. Thayer therein.

You are further and also commanded to require of the said James E. Boyd that he forthwith deliver to the said John M. Thayer all the books, papers, furniture, and other things pertaining to said office of Governor of Nebraska.

You will execute this writ forthwith and make due return of your doings hereon without delay.

Witness the Honorable Amasa Cobb, chief justice of said supreme court, at Lincoln, Nebraska, this 5 day of May, 1891.

D. A. CAMPBELL,
Clerk of the Supreme Court of Nebraska.

[Endorsed:] 4610. In the supreme court of Nebraska. The State of Nebraska *ex rel.* John M. Thayer *vs.* James E. Boyd. *Quo warranto.* Writ of ouster.

132 And on the same day, to wit, May 5th, 1891, a certified copy of said judgment issued.

And on the same day, to wit, May 5th, 1891, a writ of ouster was returned and filed, with the following endorsement thereon:

STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that I served the within order on the respondent, James E. Boyd, at the Governor's office, in the capitol building of the State of Nebraska, at the hour of 5.15 p. m., on this the 5th day of May, 1891, by delivering to him in person a duly certified copy of the within order, with all the endorsements thereon; and thereupon the said James E. Boyd surrendered to me the possession, for the relator, — the said office and all the books, papers, furniture, and other things pertaining to said office of Governor of Nebraska, and I thereupon delivered the same into the possession of the relator,

John M. Thayer, at the hour of 5.15 p. m., on this the 5th day of May, 1891.

SAM. McCLAY, *Sheriff*,
By C. W. HOXIE, *Deputy*.

Fees:

Service	50
Copy	25
Mileage	20
	95

Supreme court of Nebraska. Filed May 5, 1891. D. A. Campbell, clerk.

And on the same day, to wit, May 5th, 1891, certified copy of judgment was returned and filed, endorsed as follows, to wit:

133 STATE OF NEBRASKA, } ss:
Lancaster County, }

I do hereby certify that I served the within certified copy of the judgment *of* the respondent, James E. Boyd, in person by delivering to him a duplicate certified copy thereof, with all the endorsements thereon, at his room, in the Governor's offices, in the capitol building, at the hour of 5.15 p. m., on this the 5th day of May, A. D. 1891.

SAM. McCLAY, *Sheriff*,
By C. W. HOXIE, *Deputy*.

Fees:

Service	50
Copy	20
Mile-	20
	95

Supreme court of Nebraska. Filed May 5, 1891. D. A. Campbell, clerk.

134 And afterwards, to wit, on the 20th day of May, 1891, there was filed in the office of the clerk of said supreme court of Nebraska a writ of error in said cause from the Supreme Court of the United States; also an appeal bond in the sum of $500; which said bond is in words and figures as follows, to wit:

135 Copy.

Know all men by these presents that we, James E. Boyd, as principal, and Henry D. Estabrook, as sure*ties*, are held and firmly bound unto the State of Nebraska or John M. Thayer, or either, in the full and just sum of five hundred dollars, to be paid to the said State of Nebraska or the said John M. Thayer, and to certain attorney,

executors, administrators, or assigns of said Thayer; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a term of the supreme court of the State of Nebraska, in a suit depending in said court between The State of Nebraska on the relation of John M. Thayer against James E. Boyd, a judgment was rendered against the said Boyd, and the said Boyd having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Nebraska & the said Thayer, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from date:

Now, the condition of the above obligation is such that if the said James E. Boyd shall prosecute said writ to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES E. BOYD, [SEAL.]
By H. D. E., *Att'y.* [SEAL.]
HENRY D. ESTABROOK. [SEAL.]

Sealed and delivered in presence of—

——— ———.
——— ———.

Approved by—
DAVID J. BREWER,
Associate Justice Sup. C't.

May 15th, 1891.

136 DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Personally appeared before me, Charles B. Beall, a notary in and for the District and city aforesaid, Henry D. Estabrook and made oath that he is worth the sum of five hundred dollars over & above all of his just debts and obligations.

HENRY D. ESTABROOK.

Witness my hand and seal this 15th day of May, 1891.
[NOTARIAL SEAL.] CHARLES B. BEALL,
Notary Public.

[Endorsed:] 4610. The State of Nebraska *ex relatione* John M. Thayer *v.* James E. Boyd. Bond. Supreme court of Nebraska. Filed May 20, 1891. D. A. Campbell, clerk.

137 And afterwards, to wit, on the 26th day of May, 1891, there was filed in the office of the clerk of said supreme court of Nebraska a citation, directed to the relator, John M. Thayer, citing

and admonishing him to be and appear at a Supreme Court of the United States within thirty days from May 15th, 1891, with acceptance of service of same endorsed thereon.

And also on the same day, to wit, May 26th, there was filed in said clerk's office an assignment of error in words and figures as follows, to wit:

138 In the Supreme Court of the United States, *ss:* October Term, A. D. 1891.

JAMES E. BOYD, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA *ex Relatione* JOHN M. THAYER, Defendant in Error. } Assignment of Error.

And now comes the said plaintiff in error and says that in the record and proceedings of the supreme court of the State of Nebraska in the above-entitled cause there is manifest error, and for error said plaintiff in error assigns the following, to wit:

1st. That in the above-entitled cause in the supreme court of the State of Nebraska, being the highest court of said State in which a decision could be had in said suit between The State of Nebraska at the relation of John M. Thayer and James E. Boyd, wherein was drawn in question the validity of a statute of the United States, the decision and judgment was against the validity of the statutes of the United States.

2nd. That the decision and judgment of the supreme court of Nebraska, being the highest court of the State of Nebraska in which a decision and judgment in said suit could be had between the said parties, wherein a right, title, privilege, and immunity was claimed under the Constitution and statutes of the United States by the plaintiff in error and the decision and judgment of said court was against said right, title, privilege, and immunity specially
139 set up and claimed by the plaintiff in error under said Constitution and statutes of the United States.

3d. That the decision and judgment of said court was against the law.

4th. That the decision and judgment of said court was against both the law and the evidence and against the law under the evidence.

5th. That the decision and judgment of said court was rendered in favor of the defendant in error, when it should have been rendered for the plaintiff in error.

And the said plaintiff in error prays that decision and judgment aforesaid may be reversed, annulled, and altogether held for naught.

A. H. GARLAND,
H. MAY,
JOHN C. COWIN,
JOHN D. HOWE,
Attorneys for Plaintiff in Error.

H. D. ESTABROOK,
J. C. CRAWFORD, *Of Counsel.*

140 [Endorsed:] 4610. State of Nebraska *ex rel.* J. M. Thayer *vs.* James E. Boyd. Assignment of error. Supreme court of Nebraska. Filed May 26, 1891. D. A. Campbell, clerk.

141 STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The State of Nebraska *ex relatione* John M. Thayer against James E. Boyd as fully as the same remains on file and of record in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 26th day of May, A. D. 1891.

D. A. CAMPBELL,
Clerk Supreme Court.

Endorsed on cover: Nebraska C. C. U. S. No. 1208. James E. Boyd, plaintiff in error, *vs.* The State of Nebraska *ex rel.* John M. Thayer. Filed June 15, 1891.

FILED
OCT 12 1891
H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

NO. .....

JAMES E. BOYD,

Plaintiff in Error.

—v—

THE STATE OF NEBRASKA *ex rel*

JOHN M. THAYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT OF

J. C. COWIN

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

NO. .....

JAMES E. BOYD,

Plaintiff in Error.

—v—

THE STATE OF NEBRASKA *ex rel*
JOHN M. THAYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT OF
J. C. COWIN
Attorney for Plaintiff in Error.

STATEMENT OF THE CASE.

The controversy between the parties to this cause involves the title to the office of Governor of the State of Nebraska for two years, commencing in the month of January, 1891. and the question presented here is one of United States citizenship, with respect to which

the judgment of the Supreme Court of the State of Nebraska was against the right claimed by plaintiff in error, under the Constitution and laws of the United States.

The Constitution of the State of Nebraska adopted in 1875, provides with respect to eligibility to the office of Governor, as follows:

"Section. 2. No person shall be eligible to the office of Governor or Lieutenant Governor who shall not have attained the age of thirty years and been for two years next preceding his election a citizen of the United States and of this State. None of the officers of the Executive Department shall be eligible to any other state office during the period for which they shall have been elected."

Article 5, Sec 2, Constitution of Nebraska.

The relator, John M. Thayer, was duly elected Govenor for the Stae of Nebraska in the year 1888, for the term of two years, commencing January, 1889, and terminating the 8th day of January, 1891. The general election for Governor and other state officers was held on the 4th day of November, 1890, at which election there were three candidates for the office of Governor, James E. Boyd, the Democratic nominee, who received, according to the face of the returns, 71,331 votes; J. H. Powers, the Independent nominee, who received 70,187 votes; L. D. Richards, the Republican nominee, who received 68,878 votes; and there were scattering 3,694 votes. James E. Boyd being the person having the highest number of votes for the office of Governor was entitled to that office if otherwise qualified.

A contest for the office was instituted by J. H. Powers, to be determined by the Legislature when convened. The Constitution of the State of Nebraska provides, that immediately upon organization of the two

houses and before proceeding to the other business, the Speaker of the House in presence of a majority of each house of the legislature convened for that purpose, shall open and publish the returns for executive officers, and declare the person having the highest number of votes for any office, duly elected. This the Speaker refused to do, and mandamus proceedings were instituted in the Supreme Court of the State to compel the Speaker to peform that constitutional duty. In compliance with this mandate the Speaker opened and published the returns in the presence of a majority of the two houses assembled for that purpose, and declared James E. Boyd, he having received the highest number of votes for Governor, to be duly elected to that office for two years commencing January 8th, 1891.

Within the time provided by the Constitution and laws the respondent qualified as Governor by giving bond and taking oath required by the Constitution and laws of the State of Nebraska, and on the 8th day of January took possession of the office of Governor of the State of Nebraska, entered upon the duties of the office, and from that time on became and was the Governor of the State of Nebraska, and peformed the duties of that office until removed by the writ in this cause.

After the respondent entered upon the duties of the office of Governor, the relator instituted in the Supreme Court of the State of Nebraska, *quo warranto* proceedings, claiming to be entitled to hold the office of Governor of the State on the ground that the incumbent was not a citizen of the United States, was ineligible to be elected to, or hold the office of Governor, and for that reason that there had been no election of Governor

in November, 1890; that consequently the relator held over, and asked a judgment of ouster against the respondent.

With respect to the question of the citizenship of the respondent, the information alleges in substance that the respondent, Jas. E. Boyd, was born in Ireland of alien parents in the year 1834; that he was brought to this country when about ten years of age by his father, Joseph Boyd, who settled in about the year 1844 at Zanesville in the State of Ohio, where the father has ever since resided; that on the 5th of March, 1849 and during the February term of the Common Pleas Court of Muskingum County, in the State of Ohio, Joseph Boyd, the father of respondent, and a native of Ireland, and when the respondent was about fifteen years of age, in open court declared it to be his *bona fide* intention to become a citizen of the United States, to renounce and abjure forever all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly the Queen of Great Britain and Ireland; the record of the court is set forth in full; that Joseph Boyd, the father of respondent did not apply to be admitted, or to become, and did not become, a citizen of the United States during the minority of respondent, and was never naturalized and never did become a citizen of the United States while the respondent was under twenty-one years of age. That Joseph Boyd did not become a citizen of the United States until the year 1890, when he took out his final papers in Muskingum County in the State of Ohio, a transcript of which proceedings is set forth in the record; and finally that the respondent, James E. Boyd, never at any time declared his intention to become a citizen of the United States; nor ever made

application to be admitted as a citizen of the United States; but that he has ever remained an alien and a subject of the Queen of Great Britain and Ireland; that by reason thereof the respondent was ineligible to hold the office of Governor of the State of Nebraska.

The respondent made answer to the information of the relator with respect to the question of citizenship, in substance as follows:

The respondent, James E. Boyd, was born in Ireland, of alien parents, in the year 1834, and came to the United States with his parents when he was about ten years of age, as alleged in the information. Joseph Boyd, the father of respondent, declared his intention, as provided by act of Congress, in that behalf, to become a citizen of the United States on the 5th of March, 1849, admitting in this respect the allegation of the information. Said Joseph Boyd informed the respondent that he, Joseph Boyd, was a citizen of the United States, and that the respondent was a citizen of the United States; and when the respondent reached the age of twenty-one years, he supposed he was a citizen of the United States. His father supposed he had taken out his second papers and that he was a full citizen of the United States, and for forty-two years before the commencement of this suit, enjoyed and exercised all the rights, immunities and privileges, and discharged all the duties of a citizen of the United States, and of the State of Ohio; and was in all respects and to all intents a citizen of the United States and of the State of Ohio; a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. In 1870 he was elected to the office of justice of

the peace in Muskingum county, Ohio, and qualified for and entered upon the duties of said office, taking an oath to support the Constitution of the United States and the Constitution of the State of Ohio; for several years held the said office. and held other offices under the laws of the State of Ohio.

The respondent remained with his father until the year 1856, and in the year 1855, at the age of twenty-one years, he exercised the elective franchise and voted in Muskingum county, in the State of Ohio, in the fall of that year, supposing he was a full citizen of the United States.

The respondent in the year 1856, at the age of twenty-one years, left his father's home, in the State of Ohio, and went west to establish himself in life, supposing and believing he was a citizen of the United States. In the month of August, 1856, the respondent removed to the Territory of Nebraska, which was then, to a large extent, a wilderness, and settled in Douglas county, where he resided for two years, working at his trade as a carpenter. In 1857 he was elected county clerk of said county and entered upon the duties of that office, having taken an oath to support the Constitution of the United States and the provisions of the organic act under which the Territory was created; he removed to what is now Buffalo county, near old Fort Kearney, in the fall of 1858, where he engaged in the business of farming, in the midst of great perils from hostile Indians, and of great hardships. In 1864, at the time of the Indian outbreak in that vicinity, he volunteered his services as a soldier of the United States, which were accepted by the Government, and he was sworn into its military service under General R. B. Mitchell.

He served as a soldier of the United States without compensation or reward, to protect men, women and children on the frontier, and within the territory now composing the State of Nebraska.

In the year 1866 respondent was elected a member of the house of representatives, of the Territory of Nebraska, to represent the counties of Buffalo and Hall, and served as such member in the following session of the legislature, to which was submitted the proposition of the Congress of the United States to accept the first Constitution of the State of Nebraska, with the condition imposed by the act of Congress known as the "Admission act," hereafter referred to; before entering upon the duties of that office, he took the oath required by law, at that time, to be taken by such officers, which was known as the "Ironclad Oath," and particularly to support the Constitution of the United States, and the provisions of the organic act under which the Territory of Nebraska was created.

In 1868 respondent removed to Douglas County, Nebraska, where he has since resided. In the year 1870, respondent was elected a member of the convention of the people of the State of Nebraska, convened to form a new State Constitution, and after taking the oath required by law, entered upon the duties of that office, and served as a member of that constitutional convention. Again in the year 1875, he was elected a member of the constitutional convention, of the State of Nebraska, convened for the purpose of forming a new State Constitution, and which convention formed the Constitution under which the government of this State has since existed. He again, upon entering upon the duties of his

office at this time, took an oath to support the Constitution of the United States and the Constitution of the State of Nebraska.

In the year 1880, respondent was elected a member of the City Council, of the City of Omaha, and acted as the president of that Council.

In 1881, respondent was elected Mayor of the City of Omaha, and served in said office for two years.

In 1885 the respondent was again elected to the office of mayor and served for two years, and at each time, upon entering upon the duties of such office, took an oath to support the Constitution of the United States and the Constitution of the State of Nebraska, that for over thirty years the respondent exercised the elective franchise in the Territory and State of Nebraska, enjoyed all the rights, privileges and immunities and assumed and performed all the duties and obligations of a citizen of the United States, and of the Territory and State of Nebraska.

In the fall of the year 1890, and with reference to the election in Ohio that year, Joseph Boyd was questioned as to whether he had taken out his final naturalization papers. He supposed he had, but an examination of the records was made which failed to show final naturalization. Thereupon Mr. Joseph Boyd at the October term of the Common Pleas Court for Muskingum County, 1890, took out his final papers.

After the election of respondent to the office of Governor for Nebraska, and while testimony was being taken on the contest before referred to, the attention of the attorneys for Mr. Powers, was called to the fact by some person in Ohio, that the respondent's father had just taken out his final papers, and it having been for

over forty years presumed that he was already a citizen. the probabilities were that the respondent had taken out no naturalization papers. The respondent learned then for the first time that no final naturalization papers could be found taken out by his father during the minority of respondent. After learning that his citizenship was questioned, to remove any doubt on that question for the future, but still protesting that he was a citizen of the United States, on December 16, 1890, he appeared before the United States District Court, for the District of Nebraska, and took out final citizenship papers. The record of these proceedings appears attached to the answer of respondent. Upon the foregoing statement of facts, in substance, the respondent claimed he was a citizen of the United States and of the State of Nebraska, for more than two years before November, 1890, and was eligible to the office of Governor.

To this answer the relator interposed a general demurrer, and upon this demurrer, conceding the truth of the answer of respondent, the cause was heard and determined by the Supreme Court of Nebraska. The Court held against the claim of respondent, that he was a citizen of the United States for two years prior to November 1890, judgment was rendered in favor of the relator, a writ of ouster was issued against the respondent and the relator assumed the office and entered upon the duties of Governor. The Court was divided in opinion on the question of the citizenship of respondent, Judge Maxwell, in a learned and able dissenting opinion, holding with the contention of the respondent.

To this judgment of the Court the respondent prosecutes this writ of error, for a determination of the question whether he was a citizen of the United States for two years before the 4th of November, 1890.

SPECIFICATION OF ERROR.

The plaintiff in error contends that the Supreme Court of Nebraska erred in holding and adjudging that he was not a citizen of the United States for two years prior to November 4th, 1890.

BRIEF AND ARGUMENT.

With respect to the citizenship of the respondent, I argued the question before the Supreme Court of the State of Nebraska, upon one proposition raised and contended for in that Court by my associate, Judge Crawford and myself, and I purpose to argue here that proposition only, presenting the same line of thought and authorities, and, in fact, merely repeating my brief and argument presented to the Supreme Court of the State.

The proposition that I contend for is; that, under the policy of the Government of the United States since the adoption of the Ordinance of 1787, and the Constitution of the United States, with respect to the admission of new States into the Union, the enabling act providing for and admitting the Territory of Nebraska into the Union, as a new State, and the Constitution of the State of Nebraska accepted by the General Government at the time of its admission, all *bona fide* inhabitants of the Territory of Nebraska, capable of acquiring United States citizenship under the general policy of the Government, became citizens of the United States and of the State of Nebraska, upon the admission of the State into the General Union.

POLICY OF THE GOVERNMENT WITH RESPECT TO THE ADMISSION OF NEW STATES.

All the territory of the United States, at the treaty of peace with England, belonged to the particular States. At an early period of the war of the revolution, the question whether the vacant lands which lay within the boundaries of particular States belonging to them exclusively or became the joint property of all the States, was a most momentous one, and one which convulsed the Confederacy and threatened its existence.

On the 6th of September, 1780, Congress passed a resolution strongly urging the States to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit, and on the 10th day of October, 1780, Congress pledged itself that if the lands were ceded as recommended by the resolution, they should be disposed of for the common benefit of the United States, and the inhabitants of such ceded territory should become, in due time, by State admission, members of the Federal Union, to have the same rights of sovereignty, freedom and independence as other States, and as individuals, the same rights, immunities and privileges as citizens of the United States.

These difficulties became much more serious after the peace, and when the boundaries of the United States were established each State felt the necessity of protecting the integrity of all its territory, so that when it should be admitted into the Union the whole would stand on an equal footing with the other States. This history is important, because it will enable us the better to comprehend the phraseology of the admission acts so often referred to in the argument.

Virginia in 1784 voluntarily ceded to the United States the great tract of country lying west of the Ohio River within the acknowledged limits of the State. Other States followed in making like concessions. In every one of these grants of cession great care is taken to provide for the protection of the territory so ceded and its future inhabitants and their final admission into the Union with all the rights, privileges and immunities of the original States. With respect to this point Chief Justice Taney, in *Scott v. Sanford*, 60 U. S., at page 434, says:

"There was as we have said no government of the United States then in existence with special enumerated and limited powers. The territory belonged to sovereignties who, subject to the limitations above mentioned, had a right to establish any form of government they pleased, by compact or treaty among themselves, and to regulate rights of person and rights of property in the territory as they might deem proper."

It was the purpose, object and anxiety of all the States to secure to the territory ceded and to the inhabitants thereof in the future, all the rights of person and rights of property that their own inhabitants at that time did, or thereafter might possess and enjoy. And in the convention convened for the purpose of framing a constitution for the United States and which framed the constitution finally adopted, the question of the admission of new States was a most serious one and came near to breaking up the convention. That provision of the Constitution with respect to the admission of new States and respecting the territory and other property of the United States which reads as follows:

1. "New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of

two or more States or parts of States, without the consent of the legislature of the States concerned, as well as of the Congress."

"2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

underwent many changes and amendments before finally adopted in its present form.

The provision with respect to new States was for some time before the convention with language in substance as follows: "New States may be admitted by the Congress into this Union upon an equal footing with the original States, in all respects whatsoever," and the words "upon an equal footing with the original States in all respects whatsoever," were finally omitted from the articles, after a somewhat excited discussion upon that point. Those urging the elimination of these words based their argument on the ground that it were better to leave the matter to Congress to say upon what terms a State should be admitted, in each separate case, as the question of admission of a State should arise. I deem this consideration of great importance; that these words were not left out of the Constitution for the purpose of preventing new States coming into the Union upon an equal footing with the original States, but that it was left to Congress to determine whether or not such States should come in on an equal footing with the original States, when the question of admission should come before Congress.

It was also urged by those who sought to strike these words out of this provision of the Constitution, that it was dangerous at that time to provide by Constitutional provision that the inhabitants of a Territory, not

knowing what the character of those inhabitants might be, should come into the Union on an equal footing with inhabitants of the original States. And again, that it were better to leave the matter with Congress to say on what terms the State should be admitted.

Now it must be borne in mind that all this discussion had reference to the status of the *inhabitants* of the proposed new States, and not with reference to their political entity, for that was otherwise fixed and established by the Constitution. The amendment striking out the words "on an equal footing with the original States in all respects whatsoever," caused great excitement in the convention and imperiled its very existence.

But twelve of the States joined in a Confederacy and adopted articles of confederation now generally known as the 'Ordinance of 1787," with respect to the government of the unorganized territory, which Ordinance was afterwards incorporated into the Constitution of the United States. After the adoption by nine of the States of the Constitution of the United States, there were, therefore, two Constitutions in force, one the Ordinance of 1787, a government established by the States collectively in Congress, and the other separately in conventions of nine of the States, and the one of equal force with the other. The Ordinance of 1787 was established for the government of the territory so ceded by the States, and out of which new States were to be formed; the other for the government of all the territory, and all the States, old and new, which might be included in the Union at that time or afterwards; one ordained by States in a convention of Congress, the other by each State in a convention of the people.

The Ordinance of 1787, among other things, provided:

"And for extending the fundamental principle of civil and religious liberty, which forms the basis whereon these Republics, their laws and constitutions are erected, to fix and establish those principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed in said territory."

And again: "It is hereby ordained and declared by the authority aforesaid that the following Articles shall be considered as Articles of compact between the original States, and *the people* and States, in said territory and forever remain unalterable unless by common consent."

The Ordinance provided further that when there were sufficient inhabitants in a Territory seeking admission into the Union, a new State should be admitted upon an equal footing with the original States in all respects whatsoever.

It will thus be seen with what great care and concern, and with what jealous anxiety the State guarded that part of the territory and the future inhabitants thereof, with respect to their rights, privileges and immunities under "Constitutions and Governments which forever hereafter shall be formed in said Territory," and that when admitted into the Union the inhabitants of that Territory should be admitted with all the rights, privileges and immunities of those of the original State. For the Ordinance is that it is "Articles of compact between the original States, and *the people* and States in said Territory; and forever remain unalterable unless by common consent."

This government was not for the territory and the inhabitants as of its then and there status, but "forever hereafter."

It will thus be seen that that provision with respect to new States being admitted on an equal footing in all respects whatsoever with the original States, which had been eliminated from the article in the Constitutional Convention, and which was still in session, was incorporated into the Ordinance of 1787 by a convention organized for the purpose of the protection of this territory and its inhabitants.

It is elementary that grants are to be construed according to the law and circumstances existing when they are made. This law applies to grants of rights to persons as well as grants of rights to property. In accordance with the spirit, object and policy of the Ordinance of 1787, that the territory ceded by the several States to the General Government, and the *inhabitants* thereof, when of sufficient number to form a State, should be admitted into the Union on the same terms as the original States, with respect to the rights, privileges and immunities accorded to the inhabitants of the original States, the first act of Congress for the admission of a new State from this territory contained the exact language which had been eliminated from the Article, with respect to the admission of new States in the Constitutional Convention, that is, that the State should be admitted into the Union "upon an equal footing with the original States in all respects whatsoever."

In the discussion in the Constitutional Convention upon the amendment eliminating these words, it was conceded that with those words in the Constitution all

the inhabitants would come into the Union with the new State, with all the rights, privileges and immunities of the inhabitants of the original States, and the words were eliminated from the Constitution in the convention through the contention which prevailed, that it were better to leave that question with the Congress of the United States to be passed upon by it at the time of the admission of a new State, and as will be seen, upon the admission of the first State, it was admitted "upon an equal footing with the original States in all respects whatsoever," and every act of Congress, I believe, since that time with respect to the admission of new States, contains the same provision.

I think I may urge from this history that the purpose and policy of the government was, to place new States, and their inhabitants, on an equal footing in every respect with the original States. Mr. Justice Baldwin in his work "Baldwin's Constitutional Views," at page 91, says:

"We further know from the cession of Louisiana and Florida by treaties with foreign States, how the soil and jurisdiction of the new territories passed definitely to these States; and that pursuant to the stipulations thereof, and the Ordinance of 1787, new States have been admitted into this Union on an equal footing with the original States down to the present time."

In this discussion by the learned Judge, the Ordidance of 1787 and the treaties with France and Spain, are put upon an equal footing with respect to the consideration, that the Territory and its inhabitants are to be admitted into the Union, in due time, upon the principles of the Constitution, and upon an equal footing with the original States in every respect whatsoever.

THE TREATY OF PARIS OF 1803.

The territory included within the boundaries of the

State of Nebraska is a part of the Louisiana purchase, under the treaty with France, of 1803, article 3, of which treaty provides:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

THE ACT ORGANIZING THE TERRITORY OF NEBRASKA.

Section 5, of the act organizing the Territory of Nebraska, approved May 30th, 1854, is as follows:

"SEC. 5. *And be it further enacted*, That every free white male inhabitant above the age of twenty-one years, who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly: *Provided*, That the right of suffrage and of holding office shall be exercised only by citizens of the United States, and those who shall have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States and the provisions of this act."

THE NEBRASKA ENABLING ACT.

The title and first section of the act of Congress to enable the people of the Territory of Nebraska to form a government, approved April 19th, 1864, is as follows:

"An Act to enable the people of Nebraska to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States.

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the inhabitants of that portion of the Territory of Nebraska included in the boundaries hereinafter designated be, and they are hereby, authorized

to form for themselves a Constitution and State government, with the name aforesaid, which State when so formed shall be admitted into the Union as hereinafter provided."

"SEC. 3. *And be it further enacted*, That all persons qualified by law to vote for representatives to the General Assembly of said Territory shall be qualified to be elected; and they are hereby authorized to vote for and choose representatives to form a convention, under such rules and regulations as the Governor of said Territory may prescribe, and also to vote upon the acceptance or rejection of such constitution as may be formed by said convention, under such rules and regulations as said convention may prescribe; * * * and the aforesaid representatives to form the aforesaid convention shall be apportioned among the several counties in said Territory in proportion to the population as near as may be, and said apportionment shall be made for said Territory by the Governor, United States District Attorney, and Chief Justice thereof, or any two of them."

I also call attention to the following language of Section 4:

"SEC. 4. *And be it further enacted*, That the members of the convention thus elected shall meet at the Capital of said Territory on the first Monday in July next, and after organization shall declare, *on behalf of the people of said Territory*, that they adopt the Constitution of the United States; whereupon the said convention shall be, and it is hereby, authorized to form a Constitution and State government."

And again, this language:

"THIRD. That the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory," &c.

Sec. 5 contains this language: "That in case a Constitution and State government shall be formed for the people of the Territory of Nebraska." And again, "Whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States, without any further action whatever upon the part of Congress." It was therefore *the people of Nebraska*, "the inhabitants of Nebraska"

that were called upon to form a government, the language being "that the inhabitants of that portion of said Territory of Nebraska included in the boundaries hereinafter designated be and they are hereby authorized to form for themselves a Constitution and State government." It was not, therefore, the electors simply, those who were qualified to vote, but all the inhabitants of the Territory, and it was required that the inhabitants should be of a certain number; it was required that representatives should be appointed, not according to the electors in a county, but according to the population of that county, that is, according to the number of *bona fide* inhabitants in that county, whether aliens or citizens. And again, it is provided that the convention when assembled shall declare "in behalf of the people of said Territory" that they adopt the Constitution of the United States.

Again it is provided "that the people inhabiting said Territory do agree and declare" etc. Therefore it was the *bona fide* inhabitants of the Territory at that time that made the State and not the electors. For it will be noticed that the qualification of electors does not require citizenship of the United States or citizenship of the Territory.

A State may deny all her political rights to an individual and he yet be a citizen. The right of holding office and suffrage are political purely.

Amy v. Smith, 1 Litt., 342(Ky.)
Van Valkenberg v. Brown, 43 Cal. 51.
Scott v. Sanford, supra.

CONSTITUTION OF NEBRASKA.

The Constitution of the State of Nebraska adopted in

convention as provided by the organic act, and accepted by the General Government contains a preamble as follows:

"We the people of Nebraska, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility, and promote the general welfare, do establish this Constitution."

It is therefore *the people of the State of Nebraska* and not the electors who are "grateful to Almighty God" and "form this constitution." For in the language of the enabling act, the convention spoke "in behalf of the people of said Territory."

Section 1 of the declaration of rights is as follows:

"SEC. 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

These provisions had reference to the *bona fide* inhabitants of the State of Nebraska, upon the organization of a new government to be merged into the General Union.

Section 6 of Article 11 of the Constitution of Nebraska, under which the State was admitted into the Union, is as follows:

"SEC. 6. This Constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States, on the condition and faith of the terms of the proposition stated and specified in an act of Congress, approved, April 19th, 1864, authorizing the people of the Territory to form a Constitution and State government; the people of the State of Nebraska hereby accepting the conditions in said act specified."

This Constitution, then, was for the *whole people*, and was accepted and approved by the General Government.

THE ACT FOR THE ADMISSION OF THE STATE OF NEBRASKA INTO THE UNION.

On the 9th day of February, 1867, the Congress of the United States passed an act over the President's veto, admitting Nebraska as one of the States of the Union; it provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress, assembled*, That the Constitution and State government which the people of Nebraska have formed for themselves be, and the same is hereby accepted, ratified and confirmed, and that the said State of Nebraska shall be, and is hereby, declared to be one of the United States of America, and is hereby admitted into the Union *upon an equal footing with the original States, in all respects whatsoever.*

"SEC. 2. *And be it further enacted*, That the said State of Nebraska, shall be, and is hereby, declared to be entitled to all the rights, privileges, grants and immunities, and to be subject to all the conditions and restrictions of an act entitled, 'An act to enable the people of Nebraska to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States.' "

Section 3 provides that the act shall not take effect except upon certain fundamental conditions, which fundamental conditions were accepted by the State of Nebraska, and on the 1st of March, 1867, the President of the United States issued his proclamation declaring Nebraska to be one of the States of the Union. In his proclamation the President uses this language:

"Whereas, the Congress of the United States, did, by an act, approved on the 19th day of April, 1864, authorize the people of the Territory of Nebraska, to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States. &c."

The Congress, therefore, in the admission act, reiterate "that the said State of Nebraska, shall be, and is hereby, declared to be entitled to all the rights,

privileges, grants and immunities, and to be subject to all the conditions and restrictions of" the enabling act before referred to.

In the case of *Minor v. Happersett* 88 U. S., at page 167, Chief Justice Waite, speaking for the court said:

"Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen and member of the Nation created by its adoption. He was one of the persons associating together to form a Nation and was consequently one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were."

Now under the enabling act *every bona fide inhabitant* of the State of Nebraska "was one of the persons associating together to form" a new State "and was consequently one of its original citizens." If this be not so, then the words "inhabitants of the State of Nebraska," "the people of the State of Nebraska," and the preamble to the Constitution adopted by the State of Nebraska that "we the people of the State of Nebraska" and the declaration of rights with respect to such inhabitants are all useless words, deaf and dumb, conveying no thought, declaring no fact.

The Spanish treaty with the United States ceding Florida contains, among other things, this provision:

"The inhabitants of the Territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States."

Mr. Justice Marshall in the case of *American Insurance Company v. Canter* I Peters, at page 543, says with respect to the above:

"This treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of citizens of the United States."

The treaty of Paris in 1803, which contained similar words, has the same effect with respect to citizenship.

When the inhabitants of the State of Nebraska were called upon to form a government consistent with the principles of the Federal Constitution, with the assurance that they should then be admitted into the Union upon an equal footing with the original States, I confess I am utterly unable to conceive on what principle of law or justice these inhabitants, when the State should be admitted, should be denied "admission to the enjoyment of the privileges, rights and immunities of citizens of the United States."

In answer to my contention that the inhabitants should be admitted on an equal footing with the inhabitants of the original States, it is urged that the language "on an equal footing with the original States in all respects whatsoever," and the words "the inhabitants of the State" and the words "the people of the State" including those in the preamble of the Constitution "we the people of the State of Nebraska, grateful to Almighty God" have reference to the State in its sovereign capacity, and that Congress was not speaking, and that the people of the State of Nebraska were not speaking, with reference to the rights, privileges or immunities of the inhabitants who lived in the Territory of Nebraska at the time of admission.

I contend that when Congress said "the inhabitants of the Territory of Nebraska," that it meant *inhabitants;* that when Congress said "the people of the State of Nebraska," it meant the *people individually* and collectively; and in the preamble of the Constitution of the State adopted by Congress, it was not the State in its sovereign capacity that was grateful to Almighty God, but the people of the State.

With reference to the words "Empire," "North America," "Colony," "Nation," "State," etc., Baldwin, in his Constitutional Views, at page 15, says that all these are merely names, and the different terms of definition which mean the same thing as applied to the people. At page 40 the same author says:

"But when we approach an instrument so sacred as the Constitution, discussions about *words* are dangerous unless when their meaning is admitted and the intent is apparent; the contest is as to the phraseology or mode of expressing it, which is most appropriate or correct according to its classical or other standard of definition, use or application. Without such admission and when *words* are intended to be made *substance* and *terms things*, there is a great danger of an undue importance being attached to them, especially on those upon which so much depends as those in the preamble. The great question is, what was the substantive power—the acting thing which created the Federal Government—infused vitality and efficiency into its action? If we suffer our minds to be drawn from the great first moving power, to the mere terms which denote it by engaging in a war of *words*, we shall pursue a phantom, a phrase. The *thing* sought will be first overlooked, next forgotten and another be taken for it."

Again the same author, at page 30 says:

"The *name* given to the granting power is not its substance; the *thing* is the power; whenever that is clearly defined the *name* will be made to suit it."

Chief Justice Taney, in the case before referred

to, says that the State and the people of the State are synonymous terms. The sovereignty is the people.

The Constitution of the State of Nebraska approved by Congress, says:

"We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and form of government as the constitution of the State of Nebraska."

Now, who are "we the people?" Can there be any question but that it refers in the language of the enabling act to "the inhabitants of that portion of the Territory of Nebraska?" These are the persons who proceed now to make a government for themselves.

In the case of *Scott v. Sanford*, 60 U. S., 404, Chief Justice Taney said:

"The words 'people of the United States' and 'citizens' are synonymous terms and mean the same thing. They both described the political body who, according to our Republican Institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call sovereign-people, and every citizen is one of these people and a constituent member of this sovereignty."

But the words "we the people" refer to the people as they shall be after the government is organized; therefore "we the people" does not refer to the citizens at the time of the declaration, but refer to the citizens as they shall be when the government is formed and completed. When the language was used in the Constitution of the United States "we the people of the United States" there was not a single citizen of the United States; there was no United States; therefore "we the people" meant "we who shall be citizens when this government is formed." When the people of Nebraska used the term "we the people" there was no citizenship of the State of Nebraska.

But again: the declaration of the Constitution of the United States "we the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America," is not limited to the time of the adoption of the Constitution, or the original nine States but refers to all time in the future, and to all States that may thereafter be admitted. And with respect to the admission of a new State, this declaration has the same force and effect upon the inhabitants of such new State, as if the government was originally formed at the time of the admission of such State. The declaration "we the people of the United States, * * * do ordain and establish this Constitution of the United States of America," included within its scope the people of the State of Nebraska when that State was admitted into the Union.

Baldwin in his Constitutional Views, at page 18, says:

"The declaration in its front, therefore, necessarily refers not to the time when it was proposed, but when it was ordained and established by the ratification of the convention of nine States." And at page 97 further says:

"I have only to add one other consideration to illustrate the meaning of the preamble; all agree that the Constitution was to be established by the people of the United States, whenever the conventions of nine States should ratify it; all must agree that when it was proposed for adoption in 1787, it could not be foreseen which of the States would so ratify it. The States, therefore, could not be named till their separate ratifications were given. * * * The Constitution

was intended for posterity through all time; and for the land, the whole territory, and all the States, old and new, as one law speaking in the same words and with the same intention at the time it was proposed, and at each period when any State ratified it, and thus became one of the United States of America, by the act of the people of the States respectively. When the terms "we the people of the United States" are thus applied, they seem to me not only appropriate to the instrument, but the only terms that would be so; it uses terms in all its parts, yet we find no definition or explanations; it was intended for a code, and the term "people" was a mere designation of the power by which the Constitution was made as the "States" were designated by their separate ratifications; hence it referred in 1789 to eleven only, then to the old thirteen, and now refers to the thirteen new States; and when others shall be admitted into the Union it will refer to them as it did to the old, and now does to the new. The people of the several States which may be included within this Union as the constituent power of the Federal Government."

I may, as bearing upon this question, refer here to the case of *United States v. Cruikshank, 92 U. S. 542.*

The whole theory of our government is, that, "We the people of Nebraska," when they formed a government for themselves and were admitted into the Union, came in as if they had joined hands with the original nine States and entered the Union with them, with all the disabilities of alienage removed, and with all the rights, privileges and immunities of citizens of the United States.

The enabling act of Congress, the Constitution framed for the purpose of admission as a State and of which Congress in the admission act says: "That the Constitution and the government which the people of Nebraska have formed for themselves, be and the same is hereby accepted, ratified and confirmed," and the admission act itself, must be construed in *pari materia*, and in the light of the principles and history of our Country, with respect to the admission of new States, to deter-

mine the status of the inhabitants upon coming into the Union. And in the light of that history, in the light of the great principles governing the admission of States, and the status of the inhabitants upon admission; in the light of the great care and jealousy with which the States originally ceded the territory, and with which France and Spain ceded the territory, to provide for the final admission into the Union of that territory, with its inhabitants accorded equal right with the original States, it seems to me the construction must be in favor of vesting the inhabitants with the rights of citizenship upon coming into the Union. A State coming into the Union with one-half or two-thirds of her *bona fide* inhabitants who formed for themselves the State Government, denied the enjoyment of the rights, privileges and immunities of the citizenship of the United States, cannot be on an equality with a State, the whole of whose inhabitants, though of the same class, come into the Union clothed and vested with all the rights, privileges and immunities of American citizenship. The difference is so great that it is appalling to contemplate it; for so sacred are these rights, that it is provided by the Constitution of the United States, "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several States." And again: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

When Congress passed the act, organizing the Territory of Nebraska, it provided therein, that every free, white male inhabitant above the age of twenty-one years, an actual resident of the Territory, and who was a citizen of the United States, or had declared on oath his intention to become such, and had taken an oath to sup-

port the Constitution of the United States and the provisions of the organic act, were entitled to exercise the right of suffrage and to hold office in the Territory; the qualification of electors in the Territory of Nebraska, when the inhabitants thereof were authorized to form a State Government, were substantially the same. If, therefore, at the time that the inhabitants of the Territory of Nebraska were called upon to form a State Government for admission into the Union, three-fourths of the electors were aliens, but qualified electors by declaration of intention, as provided by the law, then, if such electors did not become citizens of the United States upon the organization of State Government, and admission into the Union, we have the remarkable *status* for these electors, of having formed a government *for themselves*, and finding themselves *aliens* to, and in, the very government they had formed and constituted.

A very large number of the electors were aliens, but who had declared their intention to become citizens, and these persons, with all other qualified electors, even under the relator's contention, were called upon by the Congress of the United States to form a government *for themselves*. Now it is to me inconceivable, that after the organization of such Government, and its merger into the General Government, these persons, the pioneers of western civilization, and who had made statehood possible, should find themselves *aliens*, in and to, the very government *of their own establishment*, without any of the rights, privileges or immunities of citizenship, and that they were disqualified from taking any part in the administration of such government, as, by representing their State in the Federal Government, or holding Federal office.

Under the acts of Congress, with respect to the admission of Nebraska, as a State, it was competent and legal for the inhabitants of the Territory of Nebraska to organize a State government without having within the territorial domain a male inhabitant of the age of thirty years, and who had been nine years a citizen of the United States; yet if such were the case, the State, when admitted, would be ineligible to perfect and complete union with the other States, if the contention of the relator is correct.

The learned judge who wrote the opinion of the majority of the court below in this case, refers to the enabling act of Congress, approved February 29th, 1889, which enabled the inhabitants of the Dakotas, Montana and Washington to form Constitutions and State Governments, asserting that such enabling act is substantially the same as the Nebraska enabling act, and says:

"The necessary conclusion from the rule of construction contended for by respondent in this case would make the Chinese residing in the Dakotas, Montana and Washington, when those States were admitted into the Union, citizens of the United States, while the Courts have universally held that the Chinese were not proper subjects for naturalization under the present laws."

Here the Court's objection to Chinese citizenship is answered, by the Court itself, by the assertion that "the Courts have universally held, the Chinese were not proper subjects for naturalization under our present laws." Now my proposition is, that upon the admission of a State, the *bona fide* inhabitants thereof, *who are eligible to citizenship*, under the general policy of the Government with respect to naturalization, become citizens of the United States by the admission of the State. I do not contend that that class of persons who are *not* eligible to citizenship under the decision of the Federal

Courts, or the policy of the Government, become citizens upon the admission of a State. The Court might as well have insisted that all Indians also became citizens, if the proposition of the respondent is correct. But the fact is, that since the Ordinance of 1787, the Indian has had a status of his own in our government, as established by Congress, with respect to citizenship.

The Court below also seemed to lay much stress upon the provisions of the law with respect to the qualification of electors at the time Nebraska was authorized to form a State government; but it is readily seen that this cannot avail the relator's contention, for the reason that that class of electors, who were not citizens, but *had* declared their intention, would be under exactly the same disability as an alien inhabitant, who *had not* declared his intention; therefore the fact that one was authorized to vote, gave him no more right to the office of Governor under the Constitution, than a *bona fide* inhabitant of the State who was *not* authorized to vote.

As against my contention here, the Court below in the majority opinion, makes the objection that "if it be true that the admission of a State naturalizes all aliens who were inhabitants of the Territory at the time, then all that need be done by newly arrived emigrants to be transformed from alienage into citizenship would be to take up their abode in a Territory prior to its admission as a State into the Union."

To say nothing of the extreme improbability of an alien pilgrimage from throughout the United States to this Mecca of proposed statehood, a sufficient answer to the suggestion of the Court is, that it is perfectly competent for the Congress, upon admitting a State into the Union, to make limitation *upon the class of inhabitants referred to by the Court*, with respect to citizenship.

The question under consideration came before the Federal Court for the District of Louisiana in July, 1813, in the case of *United States v. Laverty et al.*, (3 Martin, 733). Laverty and others were arrested under a law providing that aliens who should not naturalize within a certain time, should be deemed public enemies and punished. The defendants were alien born, and became inhabitants, but not citizens, of the Territory of Orleans after the treaty of cession with France of 1803, and therefore did not come within the provisions in that treaty with respect to citizenship granted thereby, as they were not inhabitants of that country at the time of the treaty; but they became *bona fide* inhabitants of the Territory before the Territory of Orleans was admitted into the Union as the State of Louisiana. The opinion in the case was rendered immediately after the war with Great Britain of 1812, and at a time when there was great prejudice against the defendants; but at a time, also, so approximate the organization of our General Government that the great light of the minds of that time, and that sublime event, were a guide to national thought. The learned and profound judge who rendered the opinion, states the proposition thus:

"These persons have been arrested by a warrant, issued by me, on an affidavit made by the marshal, that he believes them to be alien enemies who have neglected or refused to obey the notification of the Government respecting them. They deny that they are alien enemies, and insist that as they were *bona fide* inhabitants of the Territory of Orleans, at the time of its admission into the Union, they became citizens of Louisiana and consequently citizens of the United States."

And again the learned Judge states the contention thus:

"It is contended by the attorney of the United States that Con-

gress alone had the power to pass laws on the subject of the naturalization of foreigners, and that by the Constitution it is declared that the rule for their admission must be uniform. On the other hand, it is said that Congress has the power to admit new States into the Union; that this power is not inconsistent with, nor repugnant to, the other; that the first rule well applies where individual application is made for admission, but is not restrictive of the other power to admit at once great bodies of men, or new States into the Federal Union."

The Court further say:

"In what manner has this power been exercised with respect to other States? On the 30th of April, 1802 the inhabitants of the eastern division of the territory of N. W. of Ohio were authorized to form for themselves a Constitution and State government; this was done and they were afterwards admitted into the Union. Previous to their admission the people of that country were governed by what is commonly termed the Ohio Ordinance; that the population consisted partly of citizens of the United States and partly of foreigners, may be collected from the provisions of that instrument for their government; that a great body of aliens resided among them is known to many."

And again, continuing this consideration, the Court say:

"The inhabitants, then, who were authorized to form a State government for themselves must have been all the *real inhabitants* of the country, citizens or foreigners, and after the admission of the State into the Union, must have equally participated in all its advantages, because, if a party only were entitled to its benefit, *all the inhabitants* had not formed a government for themselves. Can we for an instant, believe that a wise, just and liberal government, like that of the United States, would invite any portion of people who were enjoying self-government in a considerable degree to place themselves in a situation where they would be entirely deprived of it? I can have no doubt that all the inhabitants of the State of Ohio were admitted citizens of that State by their admission into the Union."

The Court further say:

"If, then, the uniform system be the only constitutional one, any other must be unconstitutional, and though introduced by treaty, is void. If this were the only constitutional mode, I should tremble

for the fate of Louisianians; but fortunately for them and for others, it is not the only one. The expression under the treaty is that they shall be admitted according to the principles of the Constitution, that is, with the consent of Congress, which shall be obtained as soon as possible, and it has been since given. By this construction every part is reconciled, and if Congress in their liberality included others who have since settled in the country, they had a right to do so. * * * * I have already shown that they have exercised this right heretofore; that in the case of Ohio it was not disputed, and it does not become us, at this time, to question it."

And again the Court say:

"The Government has a right, by treaty, or by the admission of a new State to naturalize, and such naturalization is equal to the other. Let us suppose, what is honestly believed by many, that although the form of government change, yet the political character of individuals remained the same, let us ask who would compose the State? For (as the learned gentleman at the bar observed) the State does not consist of land, water and trees; it is composed of men, women and children. Some say the old Louisianians and the few citizens of the United States who have settled since the treaty; no, say others, the old Louisianians have not been admitted according to the uniform rule and they have nothing to do with it, and as to the new comers, not citizens, they are out of the question. The uniform rule would unquestionably place the original citizen of the United States in a more important situation, it would give them all the power of the government. But the Government of the United States intended otherwise; they called upon the *actual inhabitants* of the country to form a government for themselves; they promised them if they should not disapprove of it, that *all of them* should enjoy its advantages and be members of it; who those inhabitants were will be a subject of strict inquiry. * * * I conclude in agreeing with the judges of the late Superior and State Courts, that by the several acts of Congress, and the admission of the State of Louisiana into the Union, all the *bona fide* inhabitants became citizens of this State."

The same question was before the Supreme Court of the State of Louisiana in the case of Desbois (2 Martin, 185) upon application of Desbois to practice

as a counsellor and attorney at law in the Superior Court in that State. By one of the rules of the Court the application is not to be admitted unless the applicant be a citizen of the United States. Desbois came to the Territory of Orleans, an alien, after the treaty of Paris in 1803, and before the State of Louisiana was admitted into the Union as a State.

In an exhaustive and learned discussion of the question by one of the greatest judges this country has ever known, Judge Francois-Xavier Martin, the conclusion is reached and judgment entered that Desbois became a citizen of the United States and of the State of Louisiana, solely by virtue of the admission of that State into the Union. The learned Judge says of Desbois:

"He admits he has no claim to citizenship by birth, nor by naturalization, under the acts of Congress to establsh a uniform rule of naturalization. *6 Laws U. S., 74 and 7 Laws U. S., 136;* having never complied with the formalities required by any of these laws."

In construing the meaning of the word "inhabitants" the learned Judge says:

"The act of Congress authorizing the formation of the constitution of this State, *10 Laws U. S., 322*, was almost literally copied from that which authorized that of the State of Ohio, *6 Laws U. S., 120*. In the first section of the latter 'the *inhabitants* of the eastern division of the territory northwest of the River Ohio,' are authorized to form, *for themselves*, a state constitution. In the fourth section the persons entitled to vote for members of the convention are described—first, all male citizens of the United States, next all other persons having, etc. The word *inhabitants*, in the first section of this act must be taken *lato sensu*. It cannot be restrained so as to include citizens of the United States only, for other persons are afterward called upon to vote. There is not any treaty or other instrument which may be said to control it. Every attempt to restrict it must proceed on principles absolutely arbitrary. If the word is to be taken

lato sensu in the act passed in favor of the people of one Territory, is there any reason to say that we are to restrain it in another act, passed for similar purposes in favor of the people of another Territory?"

After discussing the general principles of naturalization in the Colonies, and after the adoption of the Constitution, the learned Judge further says:

"It is, therefore, correct to conclude that foreigners who migrated into the Territory of Orleans after the cession, acquired, by the very act of migration, an inchoate right of naturalization or territorial citizenship, under the particular laws of the land (we mean those by which the country had been regulated under the dominion of Spain and which remained unrepealed) and the general principles of the American government.

"In 1805 in extending to their newly acquired possessions the second grade of territorial government, Congress vested new rights in the inhabitants; and as these rights expressly extended to *future emigrants*, held out new inducements to foreigners disposed to migrate—inducements to which is perhaps due in a considerable degree, the extraordinary increase of the population of the Territory.".

And again:

"The court recognizes the principle that the act enabling the people of the Territory of Orleans to form a constitution etc., ought to have a *liberal* construction, and that, without the utmost necessity, no part of it ought to be so interpreted as to destroy acquired rights. * * * The presumption, then must be that Congress in establishing a government, which necessarily must have deprived certain individuals of their civil rights, would be inclined to give them better, rather raise them to the high situation of a citizen of the United States, than to degrade them to the degree and condition of an alien."

And in conclusion the Court say:

"On the best view of the case, we are of opinion that the reference to the treaty, and the distinction made, in favor of the inhabitants, who were here at the cession, are not sufficient circumstances from which we may imply the intention of Congress to exclude from the rights of a citizen of the State of Louisiana *any person actuall*

and bona fide an inhabitant of that part of the Territory of Orleans, described in the act, at the time of its passage.

"The consequence of this opinion on the present case is, that the applicant must be considered as a citizen of the State of Louisiana, and as such is entitled to all the rights and privileges of a citizen of the United States."

The citizenship of the defendants in these cases is based on the proposition contended for here by the respondent,—the policy of the General Government with respect to the admission of new States, and the Acts of Congress admitting the State of Louisiana into the Union.

These cases are referred to and approved by the Attorney-General of the United States, March 28th, 1871. (Opinions of Attorneys General, Vol. 13, 397).

I now call the attention of the Court to the Acts of Congress with respect to the admission of Texas as a State into the Union. On the 1st of March, 1845, Congress adopted a resolution as follows:

"That Congress doth consent that the Territory properly included within and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing Government, in order that the same may be admitted as one of the States of the Union."

(*5th U. S. Statutes at large 797.*)

In pursuance of this resolution President Jones, of Texas, called a delegate convention of sixty-one members who met July 4th, 1845, ratified the proposition made by Congress, prepared a Constitution for Texas as a State in the Union, and submitted the same to the people of Texas who approved it. In December following a joint resolution was adopted by Congress as follows:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the State of Texas shall be one, and is hereby declared, one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatsoever."

By virtue of these proceedings and acts, Texas became one of the States of the Union.

It will be observed that there is nothing in these resolutions of Congress with respect to the citizenship of the inhabitants of Texas, other than the declaration that the State is admitted into the Union on an equal footing with the original States in all respects whatsoever; if, therefore, the *bona fide* inhabitants of Texas became citizens of the United States upon the admission of Texas into the Union, they became so by virtue of the Admission Acts, and not otherwise. And that it was the intention of Congress that such inhabitants should become citizens, is beyond question, for otherwise there would be a State admitted into the Union, without eligibility to be represented in the General Government by United States Senators or Representatives in Congress; a nine years' citizenship being required for eligibility to that office.

In the case of *Cryer v. Andrews*, 11 Texas 183, the Supreme Court of Texas say:

"When the Congress of the United States under the authority to admit new States, receives a foreign nation into the Confederacy, the laws of these respective nations, in relation to the naturalization of individual emigrants, have no application to the respective citizens of each. By the very act of union, the citizens of each become citizens of the government or governments formed by this union. The position which has been sometimes broached that the citizens of Texas must submit to the laws of naturalization, before they can become citizens of the United States, is quite preposterous. No such doctrine was ever admitted or applied to the citizens or inhabitants of

Louisiana or Florida, countries acquired by purchase. (2 Martin 158, 3 Martin 733). Much less is it applicable to the citizens of a State which, by voluntary treaty or legislation, becomes incorporated into the United States. And if the citizens of Texas cannot be deprived of their franchise as citizens of the United States, neither can citizens of the latter be stripped of the immunities and privileges pertaining to citizens of this State."

In *Barrett v. Kelley*, 31 Texas, 481, the question was again before the Supreme Court of that State and the Court said:

"When the annexation to the United States took place in 1845, we became a part and parcel of the United States, and none of the citizens of the United States were alien to Texas, and the citizens of Texas would be in their own country from the St. Lawrence to the Gulf of Mexico."

The Congress of the United States has recognized this collective naturalization on the admission of a new State. In 1842, Mr. Levy, the delegate to Congress, from the then Territory of Florida, had a contest in the House, with respect to his election, upon the question of citizenship. The question, however, was discussed as one of fact, whether the father of the delegate was in the territory of Florida at the time it was acquired by treaty from Spain; it was conceded that if he was, he became a citizen by virtue of the treaty and that his son, the delegate, being then a minor, became a citizen also.

The contesting proceeding were somewhat bitter and continued through two sessions, learned counsel being employed in the case. It is important, therefore, to the consideration of this case, that in that discussion it was *conceded* that three methods of naturalization obtained—first, individual naturalization by act of Congress under the uniform naturalization laws; second, collective naturalization by treaty; and third, collective naturalization by the admission of new States. In the

report of the committee found in Contested Election Cases, Second Session, 38th Congress, 41, this language is used:

"The fourth section of the act of Congress April 14th, 1802 secures to the infant children of persons naturalized, the benefit of their parent's naturalization, provided such children were at the time living in the United States. It matters not whether the naturalization be effected by act of Congress, by treaty, or by admission of new States, the provision is alike applicable. The condition of the parent is impressed upon the child."

Paschal in his Annotated Constitution, 3rd edition at page 275, says with reference to citizenship authorized by Congress:

"All this was done under the war and treaty making powers of the Constitution, and those which authorize the National Government to regulate the territory and other property of the United States, and to admit new States into the Union."

No man did more to make the Territory of Nebraska eligible to statehood than the respondent, James E. Boyd. He was one of the earliest settlers in the Territory, invited there by the General Government, and remained there continuously, assisting in its development, shielding the Government and its inhabitants from its enemies, and enduring all the hardships of the pioneers in western civilization. Having assisted in making the Territory worthy of, and eligible to, statehood, he was one of the *inhabitants*, called upon with others, by the United States Congress, to form a State government, *of themselves, by themselves, and for themselves—of the inhabitants, by the inhabitants, and for the inhabitants* —to be admitted into the Union on an equal footing with the original States. He assisted in making that Government. In the language of Chief Justice Waite in *Minor v. Happersett*, *supra*, "he was one of the per-

sons associated together to form" a State government; and in the language of the learned Judge, I also insist that he "was consequently one of its original citizens," and a citizen of the United States, and elgible to the office of Governor of such State.

All of which is respectfully submitted.

J. C. COWIN,

Attorney for Plaintiff in Error.

Office Supreme Court
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DEC 8 1891
JAMES H. McKENNEY

Supreme Court of the United States.

JAMES E. BOYD,
Plaintiff in Error,

vs.

STATE OF NEBRASKA ex rel.
JOHN M. THAYER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR,

ON THE FOLLOWING POINTS:

1. *RELATION.*
2. *CONSCRIPTION ACT.*

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1. *RELATION.*
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On the 4th day of November, 1890, James E. Boyd was elected to the office of Governor of Nebraska. On the 5th day of May, 1891, he was ousted from the position by the decision of the Supreme Court of Nebraska declaring him ineligible, for that he was not then, nor had he ever been, a citizen of the United States. His exception to this decision, and these proceedings in

error, were not taken for the purpose of contesting the emoluments of that office; for the emoluments are too inconsiderable to be worth the issue. But he appeals to this Court to vindicate his title to American citizenship; that, being deprived of his office and its honors, he may not find himself also deprived of his country and the protection of its flag!

If the admission of a territory into the Union renders the then inhabitants of such territory *eo instante* citizens of the United States, there is no occasion for urging upon the Court the exceptional facts in the case of Mr. Boyd. But there are circumstances, revealed by the records, which entitle his case to be considered separate and apart from any general or sweeping process for the manufacture of citizens.

Permit me to catalogue these circumstances:

1. In 1849, at the age of ten years, James E. Boyd was brought to this country by his father, Joseph Boyd.

2. Never since then, even on a visit, has he been beyond the boundaries of the United States.

3. His taxes, of whatever description, have been paid to this government.

4. He grew up in the full faith of his father's citizenship, and of his own.

5. He had observed his father in the exercise of every privilege and prerogative of an American citizen.

6. His father deemed himself, and claimed to be, a naturalized citizen of this country. *He so informed his son.*

7. This claim was universally acquiesced in by his neighbors and fellow-townsmen.

8. Since his majority Mr. Boyd himself has voted at every election, state, municipal and national, without challenge.

9. He has held office as city clerk, city councilman, mayor, state legislator, and member of two constitutional conventions.

10. In each of these offices he has reiterated his oath of allegiance to the government of the United States and sworn to support the constitution thereof.

11. He volunteered his service as a soldier of the federal government to defend the frontier from the attack of Indians.

12. Every utterance, every act, has been that of a loyal, patriotic member of our commonwealth.

13. Mr. Boyd's life for the last forty years has not been a masquerade, concealing the heart of an alien beneath the toga of a citizen. His belief in his citizenship has been sincere and genuine; indeed, *his entire honesty is conceded.*

We regard this concession of paramount importance. Good faith is always a challenge to the conscience of a court. It is the one element which justifies an appeal to the DOCTRINE OF RELATION, which doctrine we confidently invoke in behalf of plaintiff in error.

On what ground is it claimed that Mr. Boyd is not a citizen of the United States? Is it for anything vital; anything intrinsic, essential, or meritorious? No. It is because his father failed—not to take out his naturalization papers, but —to take out his *second* papers *at a particular time.*

This is the whole case in a nut-shell.

When Joseph Boyd made his declaration of intention in 1849, his son, James E. Boyd, was ten years of age. Had the father, at any time within the next eleven years, completed his naturalization, his son would have been *ipso facto* a citizen of the United States. This is conceded: indeed, it is the positive statutory provision.

But Joseph Boyd, it is said, failed to take out his final certificate until 1890. The answer alleges that long prior to this time Joseph Boyd obtained his final papers, and that his action in 1890 was superfluous, only taken because he was at the time unable to find his certificate, and a recent Ohio statute had made it obligatory to file with the registrar the original credentials. Be this as it may, it is admitted that for more than forty years Joseph Boyd *believed* himself to be an American citizen; and if, through inadvertance or ignorance, he failed to take out his final papers until 1890, he had, in the meantime, demeaned himself as a citizen, and had been permitted to exercise a citizen's rights and privileges.

If the officers of the law, whose duty it was to guard and protect the ballot, accepted for forty years the word of Joseph Boyd, *would it have become his son to question it?* If the agents of our

government acknowledged his citizenship, *should the son come forward as the only skeptic?* In short, do the laws of our nation make it incumbent upon a son, under such circumstances, to say to his father, "To be sure, you tell me you are naturalized, and to be sure, I observe you in the constant exercise of rights which only citizens possess; but it is possible that some day I may be elected Governor, and for my own protection I insist that you shall exhibit for my scrutiny and judgment your muniments of title."

A failure to make such a demand, at all events, is reasonably excusable, and if there is a way by which the consequences may be avoided without violating the spirit and intention of the statute, it seems to me the duty and the privilege of the Court to follow it. To me, the way seems plain, the jurisdiction ample, the occasion for its exercise apparent and undisputed.

If the final act of naturalization, taken by Joseph Boyd in 1890, may be deemed to relate back to his declaration of intention made in 1849, and the completed transaction takes effect as of that date, then James E. Boyd is a citizen, and has been for all these years. A court cannot, indeed, recall the past, but it can set back the

hands of the clock. It cannot, in fact, change the date of a transaction, but by a legal fiction it can accomplish the same purpose. In determining whether the doctrine of relation is applicable to the case in hand, it is necessary to know:—

First, What naturalization is, and the process of acquiring it; Second, What the doctrine of relation is, and the principle of its application.

NATURALIZATION.

Naturalization, in brief, is the national adoption of a foreigner.

"What, then, is naturalization? There is no dispute about the meaning of it. The derivation of the word alone makes it plain. All lexicographers and all jurists define it one way. In its proper, etymological, and legal sense, it signifies the act of *adopting a foreigner* and clothing him with all the privileges of a native citizen or subject." (*Opinions of Attorney General U. S., Vol. 9, 356.*)

The method by which this adoption shall be accomplished is one of national, not of international, law. "And, as the validity of the act depends upon construction of municipal or national law, all questions, whether of fact or law, growing out of the act, are referable to the municipal or national court or tribunal; it is never a question of international concern; and is not determined by a reference to external or international law."—Am. Law Reg. 18 (N. S.), 393.

The rule above stated will, of course, be modified by the conditions of any treaty. The only treaty we have had with Great Britain on the subject was in 1870, and there is nothing in its terms providing the *modus operandi*. Independent of statute or provision by treaty, expatriation is accomplished by emigration with the intent to establish a domicile in another country, followed by acts confirmatory of the intention. Thus, Wheaton, in his work on international law, in a foot-note, says, "Most nations admit that if a native voluntarily emigrates and makes a permanent domicile in another country, and receives from that country the full rights of citizenship, the country of his birth cannot enforce claims upon him originating after his naturalization."

It is said in *White vs. Brown*, 1 Wall. 217, "That all the controversy on the point of change of national domicile must ultimately come to Lord Kingsdown's rule: The party must intend to put off one nationality and put on another."

In the case of Anderson and Thompson, arising between the United States and Mexico in 1868, it appears that there was a law of the Mexican Republic converting every purchaser of land into a citizen unless he declared at the time to the contrary. To be sure, Lieber, to whom the controversy was referred as umpire, decided that although Anderson and Thompson had purchased lands in Mexico, they had not intended to relinquish their American citizenship.

These instances are cited to show the facility of acquiring citizenship and the liberality of most countries in bestowing it. The American policy has been to encourage immigration by every honorable means. It holds out greater inducements for foreigners to become naturalized than all other countries combined. To this policy we owe our greatness and our phenomenal development. This concession on the part of the United States has not been purely philanthropic or

benevolent. In Christern's case, Judge Freeman said, "The United States are so largely indebted to immigration for their power, growth and prosperity, that it would be an act of folly to return to the illiberal policy of George III., who, in consequence thereof, stands charged in the Declaration of Independence with having endeavored to prevent the population of the United States by obstructing the laws for the naturalization of foreigners."

And so it is laid down as a *rule* of construction that "*naturalization laws shall be liberally construed and every intendment is in favor of the person claiming citizenship.*"—16 Wendell 617.

From the foregoing it will sufficiently appear that the status of citizenship conferred by the United States is not a mere accolade, a gratuitous compliment, but there is a corresponding benefit to the government itself, a *quid pro quo* which gives the transaction some of the qualities of a contract. And so naturalization had been called "*a sort of contract between the alien and the nation which adopts him.*"—Morse on Cit. p. 154.

Now the consummation of this contract, this proceeding for adoption, results in the judgment

of a court of record and has all the sanctity and all the attributes of a judicial decision.

"The various acts upon the subject submit the decision, on the right of aliens to admission as citizens, to courts of record. This judgment is entered on the record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, *like every other judgment*, to be complete evidence of its own validity."—*Spratt vs. Spratt*, 4 Pet. U. S. 407.

See also *in re* McCopper, 5 Sawyer 630, decided by Mr. Justice Field; 14 Op. 509 Williams, 1874.

The federal government alone has the power to confer naturalization. It might, and probably should, establish a special tribunal for the trial of these questions, where the records of judgments rendered could be easily accessible. It has, however, made most state courts of record special federal courts for this particular purpose. Foreign nations complain of the arrangement on account of its evident want of convenience in examining naturalization proceedings. But in legal contemplation, all these diverse, scattered documents are filed in one court, and that court established specially to naturalize foreigners.

It appears, therefore, that *naturalization may be considered:* first, *as a contract between the government and the alien;* second, *as a judicial proceeding resulting in a judgment of adoption.* I will proceed to consider it in both of these aspects.

NATURALIZATION AS A CONTRACT.

Suppose a man asks for bids for the erection of a house according to plans and specifications. Suppose a contractor sends in his written offer to build the house on the terms proposed. Until the offer is taken up there is nothing binding; but so soon as the proposal is accepted it becomes an executed contract, which for certain purposes may take effect from the date of the proposal or the date of the acceptance. The concurrence of these acts constitutes the single transaction—the contract. Now, if "naturalization is a sort of contract," what sort of a contract is it? It seems to me that the United States hold out an invitation to aliens to become citizens under certain

rules and conditions; that the declaration of intention is a bid on the part of the alien to become a citizen on the terms proposed; that the final certificate is an acceptance by the government—*the whole constituting one transaction.*

JUDICIAL ADOPTION.

To consider naturalization as a judgment does not necessarily deprive it of its character as a contract; for a judgment is the highest type of contract. This process of national adoption is analogous to the proceedings in a state probate court by which the child of one person becomes in legal contemplation the child of another. The decree of adoption once entered, there would be no doubt that, if it became necessary to protect the child, or his property, or those who claim through him any personal or property rights, the decree would be deemed to date from its actual entry, or from the inception of the suit, as equity might require.

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In the process of national adoption, the consent of the nation of the person's nativity is dispensed with. The United States government expresses its willingness to adopt the foreigner. The foreigner comes into a court of record and files his sworn statement in which he declares, not only his willingness, but also his intention to be adopted. Afterwards he applies to the same court, or, what in legal contemplation is the same court, for final judgment. His certificate is only the transcript of that judgment. Having obtained it, all collateral attack upon his citizenship is forestalled. Is there any reason why that judgment, if it be necessary to protect the person or property of the individual so adopted, or the person or property or rights of the children of such person, or those claiming through him, should not date and take effect from the inception of the proceedings, to-wit, the declaration of intention?

But I am not even insisting that naturalization should be considered as a contract or a judgment of adoption. All that I insist upon is that the declaration of intention and the final certificate of naturalization, are co-related, mutually dependent acts, constituting one transaction;

that one of the acts cannot exist without the other. And in this assumption, it seems to me, I am supported by the federal statutes, the legislation of the different states, diplomatic documents, and judicial opinions; all which concur in attaching a deep significance to a foreigner's declaration of intention. Some of these I wish to consider.

DECLARATION OF INTENTION.

The first act of naturalization was passed in 1790. By its terms any foreigner, after two year's residence, could make oath of allegiance and become a citizen. *No period of probation or declaration of intention was necessary.* Then came the act of 1802, the provisions of which, for the most part, constitute the present law on the subject. By the terms of this act the former *single* transaction, to-wit, the oath of allegiance, *was divided into two concurrent acts;* but that the two should constitute one transaction seems to me too plain for argument. Thus, Section 2167 of the Revised Statutes provides: "Any alien being under the age of twenty-one years who has resided in the United States three years

next proceeding his declaration of intention, and who has continued to reside therein to the time he may make application to be admitted to citizenship, may, after he arrives at the age of twenty-one years, etc., be admitted a citizen of the United States *without having made the declaration* required in the first condition of Section 2165; but such alien shall make the declaration required therein *at the time of his admission*, and shall further declare on oath and prove to the satisfaction of the court that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States." And again, Section 2168 provides: "When an alien, who has complied with the first condition specified in Section 2165 (to-wit, the declaration of intention), dies before he is actually naturalized, the widow and *children of such alien shall be considered as citizens of the United States*, and shall be entitled to all the rights and privileges as such, upon taking the oath prescribed by law."

Now the first of the sections quoted, provides that the declaration of intention to become a citizen of the United States shall be filed *at one*

and the same time with his oath of allegiance, showing that they are co-ordinate acts of equal importance; that one is the inception of citizenship and the other its consummation. Any other interpretation would make the proceeding incongruous and absurd. The section next quoted, to-wit, 2168, provides in effect that the declaration of intention made by the father and husband shall be considered as having been made by the widow and child; and then follows a very significant provision, namely, that the alien dying after having made that declaration of intention and before he is *actually* naturalized (not before he has *had time* to become actually naturalized), his widow and children shall be *ipso facto* citizens of the United States. There is, however, the further provision that they shall only "be entitled to *all* rights and privileges of such citizenship upon taking the oath prescribed by law." In other words, they are citizens of the United States by the fact of such death, but are not entitled to *all* the privileges of such citizenship until they have further taken the oath. That such is the correct interpretation of the statute has been judicially determined by the Supreme

Court of Texas in the case of *Schrimph vs. Settegast*, 38 Tex. 96; same case, 35 Tex. 323. The petition in this case alleged that the father of the plaintiffs came from the kingdom of Prussia in 1851, and settled in Harrison County, Texas, and that he intended to make the United States his home; that he became domiciliated; that, as soon as he was able, he made the proper declaration before a court of record of his intention to become a citizen of the United States, but that he died before the full period of his naturalization had elapsed. Whereupon the Supreme Court of Texas say: "When a citizen or subject of a foreign government emigrates to this state, and, after residing here long enough, makes the usual declaration before the clerk of a court of record of his *bona fide* intention to become a citizen of the United States, but dies before he has remained long enough to receive his certificate of citizenship, his children, born abroad, who came to Texas with the father before attaining the age of seventeen years, take an estate of inheritance in the land owned by the father, and upon attaining the age of twenty-one years become citizens of the United States and the State of Texas."

Counsel would argue from this case, and from the strict letter of the statute, that it was unfortunate for Mr. Boyd that his father had not died, and that the fact of his never having completed his naturalization, because death rendered it impossible, would confer greater rights upon his child than the fact that he did ultimately obtain his final certificate! Such a construction is abhorrent to every instinct of humanity, and must be equally offensive to a court of justice.

There is another phrase of much significance in Section 2168, last quoted, namely: "When any alien, who has complied with the first condition specified in Section 2165, dies before he is *actually* naturalized, etc." The use of the word "actually" necessarily implies that, after having made the declaration of intention, there is a *qualified* citizenship short of *actual* citizenship; in other words, an inceptive or inchoate naturalization. Now all that I have claimed, or all that it is necessary to claim for the declaration of intention, is, that it is the beginning of the process of naturalization, a novitiate, conferring substantial rights, but not all rights

and privileges of vested citizenship. Otherwise, what object is there in making the declaration of intention? Is it a meaningless formality, a waste of breath, a *locus penitentiae?* Or, is it a period of probation?

Numerous other statutes of the United States confer substantial rights upon a foreigner who has made his declaration of intention. I will instance only a few:—

Section 4902, Revised Statutes, provides how any citizen of the United States may take out a patent for an invention. The closing phrase of this section provides: "An alien shall have the privilege herein granted if he has resided in the United States one year next preceding the filing of his caveat and has made oath of his intention to become a citizen;" thereby placing such person upon the same plane with a citizen of the United States. Again, Section 2259 designates the person entitled to pre-emption as being a citizen of the United States or "having filed a declaration to become such, as required by the naturalization laws." Again, under the Act of Congress, May 10th, 1872, no one can acquire rights to mining claims except

citizens of the United States "or those who have declared their intention to become such." And the same may be said in reference to those entitled to homesteads; see Section 2289.

The constitutions of various states make a foreigner, who has declared his intention to become a citizen of the United States, a qualified elector. The constitution of Nebraska is to this effect.

Not only have the United States, the various courts, and state constitutions, conferred these substantial rights upon aliens who have made their declaration of intention; but, in more than one instance, such a person has been the subject of diplomatic complications between the United States and foreign powers. The case of Martin Koszta will serve for an illustration. Koszta was one of the Hungarian patriots who, after the failure of the revolution in 1848, came to the United States and in due time declared his intention to become a citizen of this country. Before he had been fully naturalized he had occasion to travel in the east, and was found in the City of Smyrna, where he was seized by the

emissaries of the Austrian government, who proposed to carry him to Austria to answer for his political crimes. Captain Ingraham, commanding the United States war-ship, St. Louis, stationed at Smyrna, demanded Koszta's release and forced his rescue at the cannon's mouth. The Austrian government demanded apology and reparation from the United States. Secretary Marcy not only refused to make such apology, but indorsed the action of Captain Ingraham. "He took the broad ground that the United States should extend protection to its citizens; that this man, having taken the *initiatory step*, was, so far as international relations were concerned, to be deemed a citizen; that, not having voluntarily returned to the Austrian dominions, it was a gross outrage to seize him and force him against his will within that territory and jurisdiction; that, finally, instead of apology for any alleged insult to the Austrian flag, the American government entirely approved and adopted the act of their naval officer, and in its turn demanded a release of Koszta. This demand was agreed to and the man was allowed to return to the United States."—Pom. Int. Law, p. 254.

Now unless Koszta had some of the attributes of an American citizen the action of our government was indefensible. If he was still a subject of the Austrian government, that government was justified in seizing him. But is it not conclusive, when the United States challenged war in behalf of a man who had simply declared his intention of becoming a citizen of this country, that such declaration was, in the opinion of our national government, something more than a mere figment—was, in truth, what Secretary Marcy characterized it, the inception of American citizenship?

President Cleveland, in his first Annual Message, 1885, observes:

"The rights which spring from domicile in the United States, especially when coupled with a declaration of intention to become a citizen, are worthy of definition by statute. The stranger coming hither with intent to remain, establishing his residence in our midst, contributing to the general welfare, and, by his voluntary act, declaring his purpose to assume the responsibilities of citizenship, thereby gains an *inchoate status*."

EXPATRIATION.

Mr. Morse, in his work on Citizenship, somewhere remarks, that "a man without a country exists only in works of fiction; that in legal contemplation every man owes allegiance to some government and is therefore entitled to the protection of that government."

If Mr. Boyd is not a citizen of the United States, he has certainly forfeited all claims to the protection of Great Britain, and is left in the suspensory, ambiguous predicament of Mohammed's coffin. I say he has forfeited all claims to British protection; making the rulings of our government, under similar circumstances, a criterion. The United States has frequently refused aid or comfort to persons claiming American citizenship, when they have yielded no allegiance to our government, paid no tribute in the way of taxes, and manifested no intention of returning to this country. Thus President Grant, in his Fifth Annual Message, 1873,

affirms: "We have agreed that citizens of the United States may cease to be citizens, and may voluntarily render allegiance to other powers. We have agreed that residence in a foreign land, without intent to return, shall of itself work expatriation. We have agreed, in some instances, upon the length of time necessary for such continued residence to work a presumption of such intent."

See also the cases of John R. McCormack and John Pepin, in the letter of Mr. Frelinghuysen, Secretary of State, to Mr. Lowell, 2 Wharton, Int. Law Digest, Sec. 171.

In reference to the application of John R. McCormack, in which he invokes the action of this government to secure for him, from the government of Great Britain, $50,000, as indemnity for five months imprisonment in the jails of Clonmel and Naas, Mr. Frelinghuysen observes:

"He has, during all this period, been relieved from his proper share of the duties and obligations that attach to and may be imposed on a citizen of the United States. He pays no taxes, either state or federal, in this country, and

does not allege that he has one dollar's worth of property, real or personal, within the territorial jurisdiction of the United States; he is not within the call or control of this government if he were needed for its defense; still further, he has not only failed, during all these years, to express any intention of ever returning to the United States, but he has also failed, in his acts, his general conduct, and his pursuits, to give any sign or manifestation of such intention to return to the country which he claims as that of his adoption. * * * * * These facts form very strong evidence of voluntary expatriation."

It is also held that citizenship may be forfeited by abandonment, which, I take it, is a species of expatriation. See numerous cases cited in Sec. 176, 2 Wharton, Int. Law Digest.

Mr. Fish, Secretary of State, to Mr. Niles, October 30th, 1871, says:

"A citizen of the United States who, for thirty-eight years has resided in a foreign country and has, during that period, in no way contrib-

uted to the support or maintenance of his own government, can not claim its diplomatic intervention in his behalf."

Mr. Fish, Secretary of State, to Mr. Hackett, June 12th, 1873, affirms:

"The purchase and continuous occupancy of a landed estate in a foreign country forms strong proof of an abandonment of home allegiance."

Mr. Fish, Secretary of State, to Mr. Washburne, June 28th, 1873, observes:

"*Each case, as it arises, must be decided on its own merits.* In each, the main fact to be determined will be this: Has there been such a *practical* expatriation as removes the individual from the jurisdiction of the United States?"

[Above is also referred to by Mr. Frelinghuysen to Mr. Lowell, February 27th, 1884.]

"Naturalization is the highest, but not the only evidence of expatriation. Such acts, in addition to the selection and enjoyment of a foreign domicile, as amount to a renunciation of United States citizenship and a willingness to submit to, or adopt the obligations of a citizen of the country of domicile, such as accepting

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public employment, engaging in military services, etc., may be treated by this government as effecting expatriation."—14 Op., 295 Williams, 1873.

This principle has been frequently applied in the case of minors. Thus:—

Secretary Evarts, in a letter to Mr. Noyes, December 31st, 1878, observes:

"A child who, born in the United States to French parents, goes in his minority to France, and there remains voluntarily after he has become of full age, may be held to have abjured his American nationality."

Mr. Blaine, Secretary of State, to Mr. O'Neill, November 15th, 1881, says:

"The child born to an alien in the United States loses his citizenship on leaving the United States and returning to his parent's allegiance."

Mr. Frelinghuysen, Secretary of State, to Mr. Cramer, June 4th, 1883, claims:

"A child born in this country to a foreign father, when taken by his father abroad, acquires the father's domicile and nationality."

Mr. Evarts, Secretary of State, to Mr. Fish, October 19th, 1880, says:

"The department holds that for a native American to put off his national character he should put on another. Continued residence of a native American abroad is not expatriation, unless he performs acts inconsistent with his American nationality and consistent *only* with the formal acquirement of another nationality, etc."

CONSCRIPTION.

Prior to the Act of Congress, March 3rd, 1863, this government did not even claim the right to draft persons of foreign birth into the armies of the United States, even though such persons had declared their intention to become American citizens.

"In 1862, certain native-born British subjects in Wisconsin claimed that, although they had voted at elections they had done so under the State law as aliens, and had not thereby forfeited their British nationality. Mr. Seward

replied that, so far as the executive authority of the United States was concerned, no foreigner who had not been naturalized, *or who has not exercised the right of suffrage*, had hitherto been required to serve in the militia."

1 Halleck's Int. Law (Baker's Ed.) 365.

"In 1861, during the American civil war, the British Government declared that if enforced enlistments of British subjects for the war were persisted in, the Government would be obliged to concert with other neutral powers for the protection of their respective subjects; but neither in the Northern or Southern States was the discharge of any British subject, enlisted against his will, refused on proper representation."

2 Halleck's Int. Law (Baker's Ed.) 6.

And Secretary Seward, in a letter to Mr. Morton, September 5th, 1862, observes:

"There is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly claimed and insisted upon it in our intercourse with foreign nations."

But the Act of Congress March 3rd, 1863, provides as follows:—

"Section 1. That all able-bodied male citizens of the United States *and persons of foreign birth who shall have declared, on oath, their intention to become citizens*, under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose."

Section 2. This section, in specifying those who are excepted from the act (none of which exceptions would apply to James E. Boyd), provides: "And no persons but such as are herein excepted shall be exempt."

12 U. S. Stat. at Large, p. 731.

The act of February 24th, 1864 (see 13th U. S. Stat. at Large, p. 6) amplifies the act of 1863.

Subsequent to the act of 1863, all foreigners who had declared their intention of becoming citizens, or who had exercised the elective fran-

chise, and who did not avail themselves of the time limited in the proclamation of President Lincoln to emigrate from the country, were regarded as American citizens, subject to all the duties of native citizenship, and entitled to like protection.

Even prior to this time Secretary Seward, in his letter to Mr. Morton, September 5th, 1862, had said:

"It is proper to state, however, that in every case when an alien has *exercised suffrage* in the United States he is regarded as having *forfeited his allegiance to his native sovereign*, and he is, *in consequence of that act, like any citizen*, liable to perform military service. It is understood, moreover, *that foreign governments acquiesce in this construction of the law*."

After the act of March 3rd, 1863, above quoted, and the proclamation of the President in the May following, Secretary Seward, in a letter to Mr. Dayton, July 20th, 1863, observes:

"Your dispatch of June 29th, No. 322, has been received. If the minister of Switzerland, residing at Paris, has been informed of all the

facts bearing on the question which he has raised, I can not believe that he would have thought it necessary to offer objections against the President's proclamation concerning the liability of emigrants in the United States to perform military service. The Federal Constitution authorizes Congress to adopt uniform rules of naturalization, and Congress heretofore prescribed the conditions of five years residence, a preliminary declaration of intention to become a citizen, and a subsequent oath of renunciation of the native allegiance and acceptance of the new one. But, on another hand, the Federal Constitution recognizes a citizenship of each State, and declares that the citizens of one State shall enjoy the right of citizenship in every other State, and leaves it to each State to prescribe the conditions of its own proper citizenship. By the constitutions of several of the States, especially the new ones, the preliminary declaration of intention, above mentioned, entitles the maker of it to all the rights of citizenship in that State, and they freely enjoy and exercise those rights. They enjoy ample protection and exercise suffrage. *It was with reference to this state of facts* that

Congress passed the law which is recited in the President's proclamation. And they passed another act, which authorized the Secretary of State to extend the protection of the government to all persons who, by any laws of the United States, are bound to render military service. The two laws seem to this government to be reasonable and just, AND THEY CONSTITUTE A NEW, ADDITIONAL AND UNIFORM LAW OF FEDERAL NATURALIZATION. But it was foreseen that some emigrants, who had declared their intention, might complain of surprise if they were immediately subjected to conscription. *To guard against this surprise* the proclamation was issued, giving them ample notice of *the change of law*, with the alternative of removal from the country if they should prefer removal to remaining here on the footing on which Congress had brought them. Surely no foreigner has a right *to be naturalized* and remain here, in a time of public danger, and enjoy the protection of a government, without submitting to general requirements needful for his own security. *The law is constitutional*, and the persons subjected to it *are no longer foreigners, but citizens of the*

United States. The law has been acquiesced in by other foreign powers, and I am sure that Switzerland can not be disposed to stand alone in her protest against it."

Plaintiff in error was clearly amenable to the provisions of the statutes of 1863-64. His father, Joseph Boyd, had years before declared his intention of becoming a citizen. This was equivalent, under familiar rules of law, to the declaration by his infant son. The status of the father established the status of the son. Both father and son had exercised the elective franchise, prior and subsequent to the President's proclamation, and maintained their residence in the United States during the sixty-five days which the proclamation permitted foreigners to emigrate.

The Honorable Secretary's construction of the law is not judicial, and is not, of course, binding upon this court, only insofar as the reasons given by him are cogent and convincing, and except as his position at the head of the state department authorized it as a measure of war. As a lawyer, morever, the opinion of Mr. Seward is always respectable.

THE DOCTRINE OF RELATION.

Judge Cooley, in the case of *Johnson vs. Ballou*, 28 Mich. 337, said: "In Viner's Ab., tit. Relation (e) it is stated, 'that where there are divers acts to make a conveyance, estate, *or other thing*, the original act shall be preferred and to this the other acts shall have relation'."

In *Cavender vs. Smith*, 3 Green (Ia.) 354, it is said: "This substantial part is recognized in Viner's Ab., tit. Relation, 291, as the 'Original Act' which is to be preferred."

Again, it is defined as "The principle by which an act done at one time is viewed by a fiction of law as done at an antecedent period." —*Anderson's* Dict., tit. Relation.

"Applies where several proceedings are essential to complete a particular transaction."—*Idem.*

Bouvier, in his Dictionary, tit. Relation, has this: "IN CONTRACTS.—When an act is done at one time, and it operates upon the thing as if done at another time, it is said to do so by relation."

It is said that relation is a *fiction* of law. It is worth while, perhaps, to emphasize the word "fiction." It pre-supposes something to be a fact, which is not a fact as a matter of fact. The only object of this fiction is to circumvent a fact. Relation is a *legal* fiction indulged for *equitable* ends. By its application a party may bring himself within the strictest letter of a statute, or the most rigorous and precise requirement of the law.

To ask of a court the employment of "an assumption of a possible thing as a fact, which is not literally true, for the advancement of justice, and which the law will not allow to be disapproved so far as concerns the purpose for which the assumption is made" [*Burrill and Webster*], is neither novel nor uncommon. So far from being shocked by the request, or attributing an argument based upon it to the "ingenuity of counsel," courts have been ever ready to resort to any well-known legal fiction where the principle of its application has been reasonably assured.

"Fiction, equity, and legislation, have been named together as the three instrumentalities in

the improvement of the law. They have been employed historically in the order here given. Sometimes two of them will be seen operating together."—*Bouvier*, tit. Fiction.

Again: "Fictions are highly beneficial and useful, especially as no fiction extends to work an injury; the proper operation being to prevent mischief or remedy an inconvenience that might result from a general rule. The maxim is, '*in fictione juris semper subsistit aequitas*'—that which ought to be done is done, and relates back to the time when it was to be done." —*Bouvier.*

The books are filled with instances of the application of the fiction of Relation, among which are the following:—

An office found, when returned, relates back and vests title in the commonwealth from the finding; so the appointment of an administrator, for certain purposes, relates back to the death of the testator; a patent, when issued, relates back to the time of the entry; a sale, when confirmed by a court of equity, relates back to the date of levy; a written lease relates back to

a parol lease which would otherwise be void; an instrument delivered as a deed, but previously held as an escrow, bears the date of delivery of the escrow; an assignment in bankruptcy transfers the debtor's title as it existed at the date of the filing of the petition; an act may give character to a prior act and make a case of trespass *ab initio;* the judgment of a court has been held to be rendered the first day of the term; when a partnership is dissolved, such dissolution relates back to the time when the commission issued; etc., etc.

The learned annotator of the American Decisions, in an elaborate note to the case of *Jackson vs. Ramsay*, 15 Am. Dec. 248, observes of this doctrine:

"It is to be applied only where it appears affirmatively that it is necessary to give some act or instrument the full effect and operation which the parties are presumed to have intended it to have, and which right and justice require that it should have. *And the doctrine is sufficiently plastic to meet the exigencies and answer the equities of each particular case.*"

In *Landes vs. Brant*, 10 How. U. S. 348, the Court say:

"Applying the doctrine of relation and taking all the parts and ceremonies necessary to complete the title together *as one act* ['as one act' are in italics], then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act—that of filing the claim in 1805."

At civil law, children born before marriage were legitimized by the subsequent ceremony of marriage:

"Assuming that, as a rule, children are not legitimate unless born in lawful wedlock, they declared that by a fiction of the law the parents were married when the child was born."—Schouler's Dom. Rel.

Analagous to the doctrine of relation is the proceeding *nunc pro tunc.*

A recent application of this doctrine was made by the Supreme Court in the case of *Border vs. Chapman*, 119 U. S. 597, where, ignoring the fact of death of one of the parties, a judgment was made to take effect antecedent to

such death—surely a rather wide chasm for even a legal fiction to leap; but the Court say:

"It is the fact of such intervening death that creates the necessity by which the power is justified, in order to prevent a failure of justice for which the other party is not responsible and by which, therefore, he should not suffer."

I know of no reason why the word "naturalization," used in the Federal Statutes, should not be accorded the same meaning given to it at common law, and in the days of Blackstone. Formerly a person was naturalized by special act of parliament; but by 7 and 8 Vict., c. 66, and the act of 1870 amendatory thereof, the *modus operandi* is substantially the same as in the United States. In both countries the power to naturalize can only emanate from the highest legislature in the land. At common law, naturalization, by a legal fiction, *related back to the time of birth;* for, as Blackstone says:

"Naturalization cannot be performed but by act of parliament; for by this an alien is put in exactly the same state as if he had been born in the king's ligeance."—1 Blk. 374.

And the children of a person thus naturalized are regarded as no longer aliens, for the learned commentator elsewhere observes:

"If an alien be made a denizen by the king's letter patent, and then purchases lands (which the law allows such a one to do), his son, born before his denization, shall not (by common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet, *if he had been naturalized by act of parliament*, such eldest son might then have inherited; for that cancels all defects, and is allowed to have *a retrospective energy*, which simple denization has not."—2 Blk. 249.

In our own country, naturalization has been held to possess a "retrospective energy."

Thus, in *Osterman vs. Baldwin*, 73 U.S. 122, the Court say:

"His (Baldwin's) present status is that of a person naturalized, *and that naturalization*

has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of his former title."

See *Jackson vs. Beach*, 1 Johnson's Cases 399.

In *Inglis vs. Trustees, etc.*, 3 Pet. 120, the Court, by Thompson J., say:

"He (Inglis) was taken from this country by his father before the treaty of peace, and has continued ever since to reside within the British dominions without signifying any dissent to the election made for him, and this ratification as to all his rights *must relate back* and have the same effect and operation as if the election had been made by himself at that time."

In this case the doctrine of relation was applied to *divest* citizenship.

THE DOCTRINE APPLIED.

The question is, *when did Mr. Boyd's father become a citizen of the United States?* Undoubtedly he completed his naturalization in 1890, but this was only the final act of a series of acts all

of equal obligation, and forming together one transaction, and creating together one status or estate. Why should not this transaction, as a whole, date from the first, as well as from the final act? There is no possible reason why it should not. There is no case in the books in which an impartial court has been invoked to apply the doctrine of relation that it has refused to do so, unless the application would divest established interests, or work hardship and injustice to innocent third parties. No such reasons exist in this case.

There is every reason why the doctrine *should* apply:—

1. There is no one to be harmed by it.

2. There is no interest to suffer from it.

3. It would carry out the wish of a majority of the people of the State of Nebraska.

4. It would only confirm what Mr. Boyd has always believed a fact.

5. In which belief he and his father both have lived and acted.

6. For, if there is such a thing as *estoppel in pais* to deny citizenship (and there would seem to be), Mr. Boyd is estopped.

7. He has voted at all elections, municipal, state and national, since his majority.

8. He has held office as legislator, member of two constitutional conventions, city councilman, city clerk, and mayor.

9. In each of these offices he has reiterated his allegiance to the United States and sworn to protect the constitution thereof.

A denial of the application of this doctrine would be:—

1. A gross injustice to an innocent person.

2. It would deny, on technical grounds, the right of citizenship to a man in every way worthy, and who has lived and acted in allegiance to the federal laws.

3. It would create confusion in state affairs.

4. It would render dubious the official acts of Mr. Boyd; for, if he were simply an alien, he was clearly ineligible to any of the offices above mentioned.

Here is the legal principle, and here are the facts. Does the principle apply to the facts?

Judge Cooley, in his famous work on Torts, pages 11 and 12, emphatically states:

"The code of to-day, therefore, is to be traced rather in the spirit of judicial decisions than in the letter of the statute. The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts in the case, because, in the opinion of the court, the facts bring the case within the principle; it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied, had some of the facts been different."

Now, if it be a general principle that when two or more facts concur to make up a single transaction, the last act shall relate to the first, and the whole shall take effect as of that date; if it is discovered that this doctrine has been universally applied in every case when its application would do justice to one party and no injustice to another;—then, it seems to me, Mr. Boyd may hopefully invoke its application in the case at bar.

DRYDEN *VS.* SWINBURNE.

I have been able to discover only one case where the precise question here involved has been judicially passed upon, to-wit, the case of *Dryden vs. Swinburne*, 20 W. Va. 89; and it is against us. That sectional prejudice tended, perhaps unconsciously, to influence the opinion of the Court, will sufficiently appear upon a careful perusal of the case. The decision, however, is entitled to the respect accorded to state courts of final resort, and as a mere precedent will subserve the purpose of the Relator. Not so the argument of the learned Judge rendering the opinion. He admits the application of the doctrine to contracts, judgments, conveyances, and other affairs, but blandly denies its application to the question of citizenship. Why, if it will establish an estate, it may not be employed to confirm a status, he vouchsafes no reason; why, if it applies to all other contracts, it does not apply to a contract between the government and an alien; or why, if it applies to all other

judgments, it does not apply to a judgment of adoption, he is absolutely silent. His only reference to the subject is in the following language:

"Another position taken is, that the naturalization of Ralph Swinburne in 1866, related back to 1852 when he made his declaration, and he is therefore to be now considered as a citizen from that date. No authority is cited to sustain this novel position except a number of cases on entirely distinct subjects, in which, for reasons applicable to such cases, the law permits in certain cases a relation back. Thus: an office found, when returned, relates back and vests title in the commonwealth from the finding; so the appointment of an administrator, for certain purposes, relates back to the death of the testator; a patent, when issued, relates back to the entry; a sale, when confirmed by a Court of Equity, relates back to the time of the sale. The astute counsel could have found, no doubt, many other cases where the law allows such relation back, sometimes for all purposes, and at other times for certain purposes only. On the other hand, innumerable cases might be cited where there is no such relation back. Each case

of this character is based on reasons applicable to it specially. But what possible bearing they, or the reasons on which they are based, have upon the present case, I confess I am unable to perceive."

I submit that this does not fairly answer the question. The mere *ipse dixit* of a judge may be all-sufficient for the particular case, but only the reasons upon which his judgment is based can have the force and sanction of judicial precedent.

Is there something so subtle and occult in the statutes relating to naturalization, or in the process by which citizenship is imposed, as to remove the subject beyond the ordinary rules and principles of law? If the determination of this question was one of international concern, I could understand the reluctance of a court to look beyond the strict letter of the statute. But it is *not* easier for a camel to go through the eye of a needle than for a foreigner to enter into the kinghood of American citizenship. Instances are, alas, too numerous where State Courts, prior to an election, have turned themselves into mere incubators for the hatching of

citizens by wholesale. (Vide, Sup. Enc. Britt. tit. *Naturalization.*) Then is it asking too much of this Court to apply a well-known, wholesome doctrine in behalf of a man whose entire life has been that of a loyal, patriotic American?

We contend that Mr. Boyd *is* a citizen of the United States:—

First, By the admission of the Territory of Nebraska into the Union.

Second, By the Conscription Act of March 3rd, 1863.

Third, By the application of the doctrine of Relation, which the exceptional facts in his case amply justify.

Respectfully submitted,

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